

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

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4 In Re: CHAPTER 11

5 LEHMAN BROTHERS HOLDINGS, INC., CASE NO. 08-13555(SCC)

6 ET AL, (Jointly Administered)

7 Debtors.

8 - - - - - x

9 In Re:

10 LEHMAN BROTHERS, INC., CASE NO.

11 Debtor. 08-08-1420(SCC)(SIPA)

12 - - - - - x

13 U.S. Bankruptcy Court

14 One Bowling Green

15 New York, New York

16

17 June 19, 2014

18 10:06 AM

19

20 B E F O R E :

21 HON. SHELLY C. CHAPMAN

22 U.S. BANKRUPTCY JUDGE

23

24

25 ECRO - MARIA R. and FRANCES FERGUSON

1 HEARING Re Trustee's Motion for an Order pursuant to
2 Sections 105(a), 502(a), 502(c) and 726 of the Bankruptcy
3 Code and Bankruptcy Rule 3009 (I) Establishing a final
4 reserve for secured, administrative and priority claims,
5 (II) Allowing certain secured, administrative and priority
6 claims, (III) Authorizing the trustee to satisfy allowed
7 secured, administrative and priority claims, and related
8 relief (LBI ECF No. 8885)

9
10 HEARING Re Fifteenth Application of Hughes Hubbard & Reed
11 LLP for allowance of interim compensation for services
12 rendered and reimbursement of actual and necessary expenses
13 incurred from December 1, 2013 through March 31, 2014 (LBI
14 ECF No. 9004)

15
16 HEARING Re Joint notice of presentment of Seventh amended
17 order pursuant to Section 78eee(b)(5) of SIPA, Sections 105,
18 330 and 331 of the Bankruptcy Code, Bankruptcy Rule 2016(a)
19 and Local Bankruptcy Rule 2016-1 establishing procedures
20 governing interim monthly compensation of trustee and Hughes
21 Hubbard & Reed LLP (LBI ECF No. 9003)

1 HEARING Re Trustee's Two Hundred Tenth Omnibus Objection to
2 general creditor claims (no liability claims) (LBI ECF No.
3 8284)

4

5 HEARING Re Motion for alternative dispute resolution
6 procedures order for indemnification claims of the debtors
7 against mortgage loan sellers (ECF No. 44450)

8

9 HEARING Re Two Hundred Fifth-Fourth Omnibus Objection to
10 Claims (ECF No. 25059)

11

12 HEARING Re Stonehill's Motion to re-file proofs of claim to
13 fix previously unliquidated claim amounts or alternatively
14 for leave to file amended claims (ECF No. 43988)

15

16 HEARING Re Plan administrator's objection to proof of claim
17 No. 33514 filed by Frank Tolin, Jr. (ECF No. 37839)

18

19 HEARING Re Lehman Brothers Special Financing, Inc. v Federal
20 Home Loan Bank of Cincinnati (Adversary proceeding No. 13-
21 01330), Pre-Trial conference

22

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1 P R O C E E D I N G S

2 THE COURT: How is everyone today?

3 MULTIPLE RESPONDERS: Good.

4 THE COURT: Good. All right. Who would like to
5 start?

6 Good morning.

7 MR. BENTON: Good morning, Your Honor, Jason
8 Benton from Hughes, Hubbard & Reed, Counsel for the LBI
9 Trustee. Mr. Ken Caputo from SIPC is also here today.

10 THE COURT: Okay.

11 MR. BENTON: Today, Your Honor, there are three
12 items on the agenda, which we plan to take in order if
13 that's okay with the Court.

14 THE COURT: That would be the nice.

15 MR. BENTON: The first item is the priority and
16 secured motion.

17 THE COURT: Right.

18 MR. BENTON: The second is the motion related to
19 certain fee matters. And the third is the trustee's 210th
20 omnibus objection to the general creditor claims of the
21 Credencial parties. Although, after the stipulation you
22 entered yesterday, that will actually just be to the -- to
23 Credencial.

24 THE COURT: Hold on one second. Okay. I have the
25 fee application and also the interim comp motion.

1 MR. BENTON: That's correct.

2 THE COURT: Right. And then we have the
3 Credencial, right?

4 MR. BENTON: Yes, Your Honor, I guess I kind --

5 THE COURT: Four.

6 MR. BENTON: -- of smushed (ph) the fee matters
7 together.

8 THE COURT: Okay. So we have four.

9 MR. BENTON: Yes.

10 THE COURT: Unsmushing.

11 MR. BENTON: I will, to not do it again.

12 THE COURT: Okay. All right.

13 MR. BENTON: Your Honor, I'll be addressing the
14 first item on the agenda.

15 THE COURT: Okay.

16 MR. BENTON: Which is the priority and secured
17 motion.

18 THE COURT: All right.

19 MR. BENTON: In that motion, we are asking this
20 Court to enter the trustee's motion for an order that sets
21 reserves and capped claim amounts for secured and priority
22 claimants, to allow a certain of those secured and priority
23 claims and to authorize the trustee to distribute, to allow
24 secured and priority claimants.

25 With Your Honor's indulgence, I would like to give

1 a very short bit of historical context --

2 THE COURT: Sure.

3 MR. BENTON: -- on this motion.

4 Your Honor, with this Court's help over the years
5 and with the help and oversight of SIPC, the trustee has
6 been able to make significant historic achievements in this
7 case.

8 In the first months of the liquidation in 2008,
9 the trustee successfully transferred 110,000 accounts,
10 allowing former LBI customers access to over \$92 billion in
11 assets.

12 Subsequently, we achieved major settlements with
13 some of the major affiliates, including specifically LBHI
14 and Lehman Brothers International Europe, and this enabled
15 us to ensure that we could pay the customer claimants in the
16 SIPA liquidation at a hundred percent.

17 And while that was going on, more than a year ago,
18 it became clear that customers would receive a hundred
19 percent on their claims, we begin to focus on reconciling
20 all the thousands and thousands of general creditor claims
21 that had also been asserted against the estate.

22 In that regard, there have been more than 13,400
23 general creditor claims, including reclassified customer
24 claims and administratively split claims.

25 To date, we've filed more than 240 omnibus

1 objections to those claims, as well as numerous one-off
2 objections. Overall the trustee has resolved more than
3 11,800 claims by orders, settlement, withdrawal or
4 otherwise, and as Your Honor is aware, just yesterday, there
5 were additional I think 200 claims resolved by court order.

6 And we're continuing to work all day and sometimes
7 every day to continue to get those claims resolved and
8 reconciled as quickly as possible.

9 Your Honor, there is still a thousand or more than
10 a thousand remaining claimants. And some of those claims
11 are going to have to be litigated in front of this court, or
12 in the current process of being litigated, such as the
13 Credencial matter that we'll be addressing later today.

14 Resolving these claims is going to take time,
15 despite every effort by both the claimants and the trustee
16 and its professionals. At the same time, the trustee has
17 also been able to achieve something extraordinary, and
18 frankly something that I don't think was anticipated at the
19 beginning of the case, a significant general estate.

20 Simply put, we have billions of dollars available
21 to get out, and we want to be able to do that. But, of
22 course, we also have to protect the disputed and unresolved
23 claimants. And I should mention, Your Honor, also that per
24 the order you also entered yesterday, there will be more
25 than a billion more dollars coming in, as part of the

1 allocation of PFI.

2 So we believe it's time to start making
3 distributions. First, to the priority and allowed claims,
4 and then as we mentioned in our papers on this priority and
5 secured motion, we plan --

6 THE COURT: You mean priority and administrative.

7 MR. BENTON: Priority, administrative and secured
8 motion.

9 THE COURT: Okay.

10 MR. BENTON: That we plan in the next days to file
11 a similar motion with respect to unsecured claims, and
12 subject to Your Honor's convenience and schedule, we hope to
13 have that heard on July 30th, so that we can actually start
14 making distributions on an interim basis to general
15 unsecured creditors. Therefore, that's why we're presenting
16 the motion today.

17 Excuse me. The security and priority and
18 administrative motion has two primary aims. As I said, it's
19 to get money out --

20 THE COURT: Right.

21 MR. BENTON: -- to creditors, and also to protect
22 creditors. It does that by first establishing reserves, and
23 also capping the amount of those reserves and allowing them
24 more amendments as of this date, after everyone's had a
25 chance to be heard, so that we can understand, okay, here's

1 the entire universe of possible priority and administrative
2 claims up with respect to administrative claims up through
3 August 31st, the bar date date.

4 THE COURT: Right.

5 MR. BENTON: Understand how much we have to pay,
6 and then begin paying out.

7 THE COURT: What's the mechanisms for making sure
8 that there will be sufficient funds for the administrative
9 claims that are not subject to the bar date?

10 MR. BENTON: Well, Your Honor, as we set forth in
11 the motion, and I hope I have the exact number right, it is
12 a very big number, we have set aside 850 million --

13 THE COURT: 850 million.

14 MR. BENTON: -- for those costs, the cost of the
15 trustee's professionals.

16 THE COURT: That's the -- and that's as large as
17 it is, that's a conservative number?

18 MR. BENTON: Yes, Your Honor, we do believe that
19 it is a conservative number, in the sense that it certainly
20 protects the ability of the estate to be able to pay all
21 ultimate and allowed and priority and secured, and will --
22 I'm not sure what the exact percentage was, it's subject to
23 so many contingencies --

24 THE COURT: Right.

25 MR. BENTON: -- but there will be money available

1 to pay --

2 THE COURT: All right. And does that --

3 MR. BENTON: -- unsecured creditors.

4 THE COURT: -- number -- so that number covers the
5 Hughes Hubbard firm and other professionals as well,
6 correct?

7 MR. BENTON: Yes, that's true, Your Honor, yes.

8 THE COURT: So it actually is many years of
9 professional fees that it covers?

10 MR. BENTON: Yes. It's intended to cover the
11 possibility that there would be many years of litigation of
12 further professional fees --

13 THE COURT: Right.

14 MR. BENTON: -- incurred. Certainly, Your Honor,
15 it could end up being less. I mean, that's a possibility.

16 THE COURT: Right.

17 MR. BENTON: But what we're trying to do is set
18 aside and reserve that adequately protects us, and
19 ultimately adequately protects the creditors.

20 THE COURT: Right. Okay. All right.

21 MR. BENTON: And also, Your Honor, I should say
22 because it was a claim that was carved out of the secured
23 and priority motion, was the Barclay's administrative claim.

24 THE COURT: Right.

25 MR. BENTON: And I'm pleased to say that the

1 parties filed a stipulation with regard to that claim
2 resolving it in a way that will allow us subject to the
3 objections that we have today. And if the Court enters our
4 motion to proceed with our plan.

5 THE COURT: Okay. So I did read everything, and
6 why don't we turn to the IRS.

7 MR. BENTON: Sure.

8 THE COURT: Because based on the explanation that
9 I read in your papers, frankly I don't understand why or how
10 the IRS still believes its exposed, it has exposure.
11 Because based on what you've explained, it seems to me that
12 they are dollar-for-dollar covered.

13 MR. BENTON: Yes, Your Honor, and that is exactly
14 what we are saying.

15 THE COURT: So is the IRS here?

16 MR. BARNAY: Yes, Your Honor.

17 THE COURT: Come on up.

18 It wasn't clear to me -- good morning.

19 MR. BARNAY: Good morning. J.D. Barnay (ph) from
20 the U.S. Attorney's office on behalf of the IRS.

21 THE COURT: How are you? It wasn't clear to me
22 that your papers acknowledged the existence of the
23 stipulation between LBHI and LBI.

24 MR. BARNAY: Your Honor, we are aware of those or
25 that stipulation, the IRS is not a beneficiary, a direct

1 beneficiary of that agreement, but we understand that there
2 is an agreement, and that it provides that LBHI would
3 indemnify LBI as to any liability it has in a consolidated
4 claim.

5 However, the point of our objection is not that
6 we're -- that there aren't reserves available to protect the
7 IRS, it is that in the unlikely event that those reserves
8 somehow become unavailable, or you know, can't be used, LBI
9 remains jointly and severally liable for its portion of the
10 consolidated claim.

11 It may have indemnity rights against LBHI,
12 pursuant to that agreement. It may have other abilities to
13 satisfy its obligation --

14 THE COURT: Okay.

15 MR. BARNAY: -- but what we're objecting to is the
16 principal here of in the guise of setting reserve amounts,
17 it's essentially trying to disallow and get out of, its
18 acknowledged, unobjected to joint and several liability for
19 the consolidated -- excuse me, for the consolidated portion
20 of the Lehman consolidated group plan.

21 THE COURT: But is the flip side of what you're
22 saying that therefore we have to double reserve?

23 MR. BARNAY: No, absolutely not. And, Your Honor,
24 in --

25 THE COURT: Okay.

1 MR. BARNAY: -- the papers that LBI submitted,
2 they referenced an agreement that the IRS has already
3 entered into with all the other sort of Lehman group
4 members, where we agreed for a sole -- single reserve that
5 LBHI is maintaining and we have already agreed with -- and
6 we've told LBI this many times, that we would agree for them
7 to not set a reserve for the IRS' claim.

8 Our only point is, okay, they don't need to set a
9 reserve, they can start making distributions, but that does
10 not absolve them from unobjected to joint and several
11 liability on a consolidated claim.

12 The likelihood that the IRS would ever have to go
13 to them, given that the IRS already has cash on hand that it
14 may try to use as set-off rights, and that LBHI has a
15 reserve is very low, which is why we don't believe that they
16 need to make a reserve.

17 THE COURT: So you have to help me out, because
18 are we in agreement or are we not in agreement?

19 MR. BARNAY: Your Honor --

20 THE COURT: I don't -- I mean, I hear the words,
21 but I don't understand given that why we don't -- why
22 there's a dispute still here.

23 MR. BARNAY: Your Honor, we've told LBI this many
24 times, and we're agreeing to them to not set a reserve for
25 us and to make distributions. They insist on having their

1 joint and several liability expunged through this reserve
2 motion which we just belief is improper and has no legal
3 basis.

4 THE COURT: Okay. And with respect to LBI also
5 indicates that they will acknowledge the set-off.

6 MR. BARNAY: Right. There's two set-offs.
7 There's sort of like --

8 THE COURT: Right.

9 MR. BARNAY: -- a non-consolidated set-off --

10 THE COURT: Right.

11 MR. BARNAY: -- which their reply completely takes
12 care of.

13 THE COURT: Right.

14 MR. BARNAY: With respect to the consolidated set-
15 off, LBI has said that it would agree to the set-off, but
16 that still leaves the possibility that LBHI or any of the
17 other Lehman entities would object to that set-off, so
18 there's still a contingency there as to whether we're going
19 to be able to use that set-off at the end of the day.

20 THE COURT: Okay. So I still need help because I
21 still don't understand why we don't have an agreement here.

22 MR. BENTON: Your Honor, I don't know if you can
23 hear me.

24 THE COURT: I can. Do you want release of the
25 joint and several liability?

1 MR. BENTON: Well, no, Your Honor, that's what --
2 of course, we would love that --

3 THE COURT: Yeah.

4 MR. BENTON: -- but that's -- I mean that's not
5 what we -- in fact, in our papers we recognize it that under
6 the Code, we do have joint and several liability --

7 THE COURT: Right.

8 MR. BENTON: -- to consolidation a portion.

9 What we are saying is in response is two things.
10 The IRS, which they didn't say in their papers, but has said
11 just now that they would've allowed us to reserve --

12 THE COURT: Once.

13 MR. BENTON: -- right. Well, they reserved once
14 already --

15 THE COURT: Right.

16 MR. BENTON: -- at LBHI.

17 THE COURT: And they're happy with that.

18 MR. BENTON: Exactly.

19 THE COURT: And they're not asking for another
20 reserve.

21 MR. BENTON: Right. But they are, but they are --
22 their parade of horrors as to why they need to come after
23 us --

24 THE COURT: Right.

25 MR. BENTON: -- is they don't want to co-

1 committingly say or to cap the amount of liability that we
2 might have if LBHI doesn't pay them, if LBHI can't come
3 through with indemnity.

4 THE COURT: Well, let's take an end of the world
5 scenario, right. So we get to the end of the world, and the
6 reserve disappears, right, and then they say, look, we --
7 they hold up the piece of paper that says joint and several
8 liability and they turn to you, and you say, sorry, I gave
9 out all the money to everybody else.

10 MR. BENTON: Well, Your Honor, they've been
11 holding \$480 million, I mean, let's not forget, they're not
12 just reserves, they're not just reserved at LBHI for \$390
13 million. They're -- to be clear, they've not asserted a
14 priority claim against us. They've asserted a secured claim
15 based on \$479 million of refunds due to the consolidated
16 group --

17 THE COURT: Right.

18 MR. BENTON: -- and so if they turn in that parade
19 of horrors to us, we have not objected, we're not going to
20 object to their right to use that as a set-off. They have
21 \$480 million in the bank.

22 So if we -- if there's a parade of horrors that
23 leads to a potential, where we have to pay out, the
24 principle of the motion is that there is a parade of
25 horrors under any claim, IRS or otherwise, where we

1 ultimately might have to pay out dollar-for-dollar, right.
2 We're going to reserve that amount for the claim. And if
3 such a parade of horrors had a basis, in fact, we wouldn't
4 have to reserve whether or not the IRS agreed we couldn't
5 reserve or not to zero, we would have to protect, or we
6 would want to protect the other creditors and our ability to
7 pay people by reserving \$390 million.

8 But they have a second reserve which is the \$480
9 million in refunds they owe to LBHI and to the consolidated
10 or to the consolidated group.

11 THE COURT: I'm sorry, now I'm even more confused.
12 So now it is that you don't want to reserve anything at all?

13 MR. BENTON: Well, we reserved -- we've agreed
14 upon our independent, LBI's independent liability, potential
15 liability with respect to the IRS.

16 THE COURT: Yes.

17 MR. BENTON: We will reserve at 2.5 which we put
18 in our papers.

19 THE COURT: And everyone agrees on that?

20 UNIDENTIFIED: Yes, that's completely resolved,
21 yes.

22 THE COURT: So with respect to the 390?

23 MR. BENTON: Yes. With respect to the 390, the
24 IRS has two reserves essentially. The IRS has 479, I might
25 have the number slightly off, but 479 million in refund

1 money --

2 THE COURT: Yes.

3 MR. BENTON: -- they are holding.

4 THE COURT: Okay.

5 MR. BENTON: For -- to use as set-off --

6 THE COURT: Right.

7 MR. BENTON: -- vis a vis the consolidated group.

8 They also have a dedicated reserve of 390 million, right.

9 THE COURT: Real money.

10 MR. BENTON: Real money.

11 THE COURT: Right.

12 MR. BENTON: And so what we are asking is to
13 reserve and cap their claim at the 2.5 million, which is the
14 most that we would ever have to pay out to them.

15 THE COURT: So you are, in effect, asking for
16 release from the joint and several liability, that's -- in
17 other words, you're not -- you are asking for that. If I
18 don't impose the requirement that you double reserve, so in
19 my end of the world scenario, they could come to you and
20 assert their joint and several liability, and you could say,
21 sorry, we're out of money, and it would be too bad for them.

22 MR. BENTON: Right.

23 THE COURT: So that's the place that we should be
24 getting to, is that you maintain, you don't ask for release
25 from the joint and several liability, but you have no

1 obligation to reserve another penny beyond the post set-off
2 amount for the unconsolidated liability, and then everybody
3 has what they want.

4 MR. BENTON: Okay. Your Honor --

5 THE COURT: Yes?

6 MR. BENTON: -- yes, we're willing to accept that.

7 MR. BARNAY: Yes, Your Honor --

8 THE COURT: Okay.

9 MR. BARNAY: -- that's what we've asked for all
10 along.

11 THE COURT: Okay. Good. All right. So I can
12 leave it to -- leave you to your own devices to put that in
13 writing?

14 MR. BARNAY: Yes, yes, Your Honor.

15 THE COURT: Okay.

16 MR. BENTON: Sure.

17 THE COURT: Very good, thank you.

18 MR. BARNAY: Thank you very much.

19 THE COURT: So then I think we had one more
20 objector, and that was Mr. Peters.

21 MR. BENTON: Yes, Mr. Peters. I've spoken to Mr.
22 Peters. I do believe that he does -- he did not want to
23 withdraw his objection. I don't believe that he's here
24 today.

25 THE COURT: Okay. Let me ask. Is Mr. Peters, are

1 you on the telephone?

2 (No response)

3 THE COURT: There's not to be. I did review his
4 objection and for the reasons set forth in the trustee's
5 papers, the objection is overruled.

6 MR. BENTON: Okay. Thank you, Your Honor.

7 THE COURT: All right.

8 MR. BENTON: And there is one more clean-up item
9 that I'd like to address. It's really a matter of -- for
10 the avoidance of doubt. We have a -- one more paragraph
11 that we would like to add to the proposed order.

12 THE COURT: Okay.

13 MR. BENTON: Its purpose is just to make clear
14 that where there is a claim that is under priority or
15 secured or administrative schedules that is expunged by
16 final non-appealable order or withdrawn or settled with
17 similar effect, that we can remove it from the reserve
18 amount just to be clear.

19 THE COURT: Sure.

20 MR. BENTON: And I had a red line if you like, I
21 can bring up to Your Honor.

22 THE COURT: That seems fine.

23 Okay. Mr. Uzzi, did you wish to make a statement?
24 How are you?

25 MR. UZZI: I'm well, Your Honor, and I don't want

1 to take up your time, but I can't resist the opportunity to
2 stand before you. It is my honor to be standing here.

3 Your Honor, for the record, Gerard Uzzi of Milbank
4 Tweed on behalf of the ad hoc group of LBI creditors. And
5 in our papers, Your Honor, we hold collectively
6 approximately seven and a half billion dollars' worth of
7 claims against LBI. We also hold collectively about \$40
8 billion worth of claims against LBHI.

9 The significance of that is that one of the major
10 creditors of LBI is also LBHI. And, Your Honor, we've --
11 let me just first say that we've said in our papers that
12 we've been working with the LBI estate fiduciaries, they've
13 been very cooperative with us and we greatly appreciate it.

14 And I believe it sets an example of how estate
15 fiduciaries should act with the ultimate economic
16 beneficiaries. And I note that Weil Gotshal is here, and
17 other LBHI estate fiduciaries here too, and I'll say the
18 same thing for them, we greatly appreciate the cooperation.

19 We filed the pleading, Your Honor, I think that
20 the Hughes Hubbard folks in their pleadings, they covered
21 everything. But the reason for us to file a pleading is
22 we're hopeful that it's helpful to the Court to know that
23 there are real economic beneficiaries out there who are
24 paying attention. We -- with all the cooperation we have
25 with all the estate fiduciaries, that doesn't mean we always

1 agree with them. And if we didn't agree with them, we would
2 be up here telling you we don't agree with them. So we
3 think it's important that when we do agree with them, to
4 also indicate to Your Honor that this -- we believe this is
5 important and meaningful relief.

6 We'll also say, just in closing, Your Honor, that
7 we're also very pleased to hear that the trustee is going to
8 be bringing what I'll call the most important motion in this
9 case, which is to make that general -- distributions to
10 general unsecured creditors.

11 We've been working with them, they've kept us
12 informed on that, and we appreciate again their cooperation.

13 THE COURT: Well, I do appreciate your making the
14 affirmative statement, because I think that folks tend to
15 focus on the fact that it's 2014, and Lehman filed in 2008,
16 and why is this still going on, and why haven't we gotten
17 money.

18 And I think that these statements that have these
19 very large numbers, both in terms of dollars and the numbers
20 of claims that have been resolved, and the numbers of claims
21 that have yet to be resolved, it's very important that those
22 numbers are said out loud, so that the public and the
23 claimants understand just what an amazing process this is,
24 and how much work there is left to be done. So I do
25 appreciate your filing the statement.

1 MR. UZZI: Well, Your Honor, thank you for the
2 opportunity to be heard, and again, for the record, we
3 support the motion --

4 THE COURT: Okay.

5 MR. UZZI: -- and ask that Your Honor enter the
6 order.

7 THE COURT: Very good. So I will wait to get a
8 revised form of order that reflects, I'll say the three
9 things that we've talked about here today. Okay. Thank
10 you.

11 Okay. So that takes us to number two, which is --

12 UNIDENTIFIED: Your Honor, may I be excused?

13 THE COURT: Yes, of course.

14 So just on the second item on the agenda is the
15 fee application of the Hughes Hubbard firm for four months.

16 MR. KOBAK: That's correct, Your Honor.

17 THE COURT: And just for my edification, SIPC
18 gives its recommendation pursuant to statute.

19 MR. KOBAK: That's correct.

20 THE COURT: And we do not hear from the United
21 States Trustee --

22 MR. KOBAK: That's correct, Your Honor.

23 THE COURT: -- is that correct?

24 And that will continue notwithstanding the good
25 fact that the customer claims have all been paid and we're

1 into general estate.

2 MR. KOBAK: That is correct.

3 THE COURT: Okay.

4 MR. KOBAK: And under the statute under Section
5 5(b), 5(c) of the SIPA statute, as I think Your Honor knows,
6 SIPA's -- SIPC's recommendation is entitled to considerable
7 reliance. SIPC does support this fee application as it
8 supported the prior ones, and no other party has objected.

9 By the way, for the record, it's James Kobak,
10 Hughes Hubbard & Reed for the SIPC Trustee.

11 This application as Your Honor noted covered a
12 four month period beginning in December of last year through
13 March of this year. It covers a total of 27,568.3 hours,
14 which include 243.10 hours of the trustee.

15 We also seek total expenses of \$181,000 --
16 \$181,713.53 and I'll note that in these cases, we do not ask
17 for reimbursement of expenses that we commonly charge to
18 other clients, such as taxi cabs and overnight meals and so
19 forth.

20 In the SIPC -- in this case, as in other SIPC
21 cases, we give a public service discount, so the amount that
22 we seek is really 90 percent of our standard fees. There's
23 also a holdback of 10 percent, although that will be
24 affected by the second motion that --

25 THE COURT: Right.

1 MR. KOBAK: -- Mr. Benton smushed up with this
2 one, but that will unsmush.

3 In addition to the discount, we take a hard look
4 at our fees and expenses, and we wrote off almost \$250,000
5 voluntarily. SIPC which reviews counsel fees and other
6 administrative expenses very carefully then talked to us,
7 and we made further reductions of over \$50,000.

8 I think that pages 9 to 23 of our application sets
9 forth the many activities that occurred during this period.
10 I know Your Honor was involved for half of it, and Judge
11 Peck was involved for half of it. I think Mr. Benton, in
12 his remarks, also noted some of those activities.

13 THE COURT: Well, also glancing at the summary,
14 Exhibit C is particularly helpful, the summary of project
15 categories. And it reflects the reality which is that the
16 vast majority of the work is in the category of claims
17 resolution.

18 MR. KOBAK: Yeah, that's correct.

19 THE COURT: Which is a very labor --

20 MR. KOBAK: That's correct.

21 THE COURT: -- intensive exercise.

22 MR. KOBAK: That's correct, Your Honor.

23 We also spent significant time reducing securities
24 to cash, which was a complicated process, and was one of the
25 reasons we are able -- have been able to achieve a sizeable

1 general estate.

2 THE COURT: Okay. Let me ask if anyone wishes to
3 be heard with respect to the application of Hughes Hubbard
4 for approval of its fee application?

5 (No response)

6 THE COURT: Okay. So I'm happy to approve the
7 fifteenth application. Just let me make one public service
8 announcement or a question. Generally speaking, while a --
9 we love to see the involvement of summer associates, we also
10 do not love to see charges for their time on fee
11 applications. So I'm just wondering since we're in summer
12 associate season and it's certainly a great opportunity for
13 law students to be involved in a historic case, I'm just
14 wondering if you faced that issue in the past, if Judge Peck
15 or SIPC had a view, just so I'm not surprised in a couple of
16 months.

17 MR. KOBAK: I don't believe that we had an issue
18 with Judge Peck in that regard. I think we have -- most of
19 the work is done by regular associates and partners, but
20 certainly some of it is done by summer associates.

21 THE COURT: So the answer to my question is, yes,
22 you will be charging for the summer associates.

23 MR. KOBAK: Well, we'll certainly take Your
24 Honor's remarks, maybe it'll be a learning experience for
25 them, Your Honor.

1 THE COURT: All right. Just take -- just keep an
2 eye on it.

3 MR. KOBAK: Yes, I'll keep that in mind. Thank
4 you.

5 THE COURT: All right. So let's move to the
6 interim comp motion.

7 MR. KOBAK: The second motion is really on
8 presentment. Again, it's supported by the Securities and
9 Investor Protection Corporation and there's no objection to
10 it. And it's to revise the seventh or to enter a seventh
11 amended procedural order, which will have the effect of
12 allowing us to recover our holdback, which is a little under
13 a million and a half dollars.

14 THE COURT: Okay.

15 MR. KOBAK: There will be a remaining amount of a
16 million dollars.

17 THE COURT: Okay. Does anyone wish to be heard
18 with respect to the seventh amended interim compensation
19 order?

20 (No response)

21 THE COURT: All right. I'll approve that as well.

22 MR. KOBAK: Thank you very much, Your Honor, and
23 I'll turn the podium back to Mr. Benton.

24 THE COURT: Okay. I guess my -- a question I have
25 for you is whether we should depart from the order of the

1 agenda and take the ADR motion before the Credencial matter.

2 MR. BENTON: I have no problem with that, Your
3 Honor.

4 THE COURT: Is everyone here who has something to
5 say about the ADR motion?

6 MR. DEFILIPPO: Debtor is ready, Your Honor.

7 THE COURT: Why don't we do that. All right. If
8 you don't mind.

9 MR. BENTON: No, of course not.

10 MR. DEFILIPPO: Your Honor, may I approach?

11 THE COURT: Yes, sure.

12 (Pause)

13 THE COURT: How are you? Sure.

14 MR. DEFILIPPO: Good morning, Your Honor.

15 THE COURT: Good morning.

16 MR. DEFILIPPO: Paul DeFilippo for LBHI as plan
17 administrator.

18 We are requesting the entry of an order
19 establishing a mandatory but non-binding ADR procedure with
20 respect to indemnification claims, we believe the estate,
21 the debtor holds against approximately 2,500 to 3,000
22 sellers with about 11,000 mortgage loans to the debtors or
23 their affiliates, which were subsequently resold to Fannie
24 Mae and Freddie Mac.

25 Over the last several days, we have attempted to

1 resolve the eleven objections to this motion. We received
2 -- we've entered into stipulations with two of the
3 objectors, PHH and Plaza Mortgage, adjourning their hearing
4 on their objections to a later date.

5 And so I won't be addressing their objections
6 directly.

7 THE COURT: All right.

8 MR. DEFILIPPO: Their rights are reserved till the
9 next hearing.

10 THE COURT: Have there been similar discussions
11 with the other nine in terms of adjournments?

12 MR. DEFILIPPO: Yes, Your Honor, there have, but
13 we've been unable to reach agreement with the other
14 objectors on adjourning their objections to a later date.

15 So with your permission, we would like to proceed
16 with the motion.

17 THE COURT: Okay.

18 MR. DEFILIPPO: As Your Honor knows, Lehman
19 Brothers, like other large financial institutions had a
20 substantial mortgage business. It acquired individual
21 mortgage loans and resold those mortgages. It used a
22 purchase agreement, which contained indemnification
23 provisions for losses suffered, as a result of breaches of
24 representations and warranties by the sellers.

25 Lehman monetized the mortgages it acquired

1 primarily in one of two ways, it either sold them to a GSE
2 like Fannie Mae or Freddie Mac, or it sold the mortgages to
3 RMBS Trust Solution Securities to finance the purchase price
4 that was used to pay Lehman for the mortgages.

5 As the mortgages defaulted, losses were suffered
6 by both the GSEs and the trust. This gave rise to claims
7 against Lehman.

8 Fannie and Freddie claims for about 20 billion,
9 the trustees of the approximately 405 private label RMBS
10 trusts have filed claims in excess of 30 billion. The
11 resolution of the GSE's claims occurred in January and
12 February of this year.

13 As a result, Lehman's indemnification claims
14 against the sellers have accrued and are now able to be
15 liquidated for the benefit of Lehman's creditors under the
16 plan.

17 The proposed ADR procedure is the first step which
18 Lehman proposes to use in liquidating those indemnity
19 claims. That's parenthetically why we believe there are no
20 statute of limitations defenses to these claims as
21 indemnification accrues when payment is made on the
22 indemnified claim.

23 We recognize the sellers may feel differently, but
24 that issue is not before Your Honor today. In fact, nothing
25 about the merits of the indemnification claims is before the

1 Court today.

2 One important thing about the Fannie and Freddie
3 settlements, Your Honor, is that in order to achieve those
4 settlements, the GSEs did a deep dive into their loan files
5 and identified thousands of individual loans with breaches
6 and losses, which Lehman was able to review and talk to
7 Fannie and Freddie about if they disagreed. But Lehman was,
8 in fact, able to satisfy itself that breaches did occur,
9 which gave rise to losses and so was comfortable agreeing to
10 allow Fannie a claim of \$2.15 billion and to pay Freddie
11 \$767 million for an assignment of all of its claims against
12 the estate.

13 The debtors are now in a position to pursue the
14 sellers of the mortgages to Fannie and Freddie through LBHI
15 for their losses.

16 The next step in the process of claims resolution
17 arising from the mortgage business will be tackling the
18 approximately 30 billion in claims and the trustees. Those
19 claims involve 15 to 20,000 allegedly defective loans sold
20 to LBHI and resold to the trust.

21 In earlier proceedings in this case, Judge Peck
22 expressed the view that in order to prove their claims, the
23 trustees likely had to show losses on a loan-by-loan basis.
24 So if the trustees' claims are ever to get resolved, we
25 expect that it will be a monumental undertaking and very

1 time-consuming to engage in that detailed loan-by-loan
2 analysis.

3 So we may be back before the Court at a proper
4 time asking Your Honor to either expand this ADR if you're
5 inclined to grant it, or to establish a new procedure to
6 resolve the amount of the trustees' losses and to add the
7 indemnification claims against the sellers that arise from
8 the payment on those losses to the ADR procedure that we're
9 asking you to establish today.

10 The purpose of giving Your Honor that background
11 is to give you a sense of the magnitude of the challenge
12 facing Lehman, as it attempts to manage the claims arising
13 out of its mortgage business, and the causes of action that
14 accrue in its favor when those claims are finally paid by
15 the estate.

16 It's not often that we encounter a set of claims
17 with thousands of potentially responsible parties on the
18 other side like the ones that arise out of this business.
19 And problems of that magnitude are not suitable for
20 resolution by standard litigation procedures by filing suit,
21 engaging discovery, and going to trial. It's time
22 consuming, it's expensive. It burdens the courts.

23 There are other instances where the --

24 THE COURT: So it's not amenable to a defendant
25 class action?

1 MR. DEFILIPPO: No, Your Honor. No, I wish it
2 were, but in other instances when the universe of potential
3 defendants was very large such in the derivatives area --

4 THE COURT: Right.

5 MR. DEFILIPPO: -- the Court has entered an order
6 establishing an ADR procedure, which included the
7 possibility of mandatory but non-binding arbitration. And
8 Lehman's prior experience in using those procedures has been
9 very successful, as more than a 2 and a quarter billion has
10 been recovered through ADR procedures.

11 So hoping to duplicate that success, we are
12 seeking a pre-litigation mandatory ADR program to deal with
13 the indemnification claims against the sellers of the
14 thousands of loans which it has reacquired from the GSEs and
15 which may be augmented by loans which it may reacquire from
16 the RMBS trustees.

17 The proposed program will have a notice response
18 date, a negotiation period, and if there is no settlement,
19 then the option for a mediation phase, similar to the other
20 ADR programs.

21 And contrary to some of the objectors'
22 contentions, those programs have been established even when
23 there has been no pending adversary proceeding. Besides our
24 own derivatives procedure in this case, Judge Glenn ordered
25 mandatory mediation in the Residential Capital case on plan

1 issues, Your Honor ordered it in Light Square without a
2 pending adversary proceeding.

3 And we want to assure both the Court and the
4 objectors that the debtors are not interested in wasting
5 time and money mediating claims that have been released.
6 But there are many claims that have not been released, and
7 the debtors have the obligation under the plan to liquidate
8 those claims for the benefit of their creditors.

9 I would note that the standing order allows the
10 Court to let someone out of mediation if Your Honor
11 concludes that the matter is not appropriate for mediation.
12 So individualized objections to mediation are still
13 available, are not being foreclosed by this process. And if
14 someone doesn't think they belong in mediation, they're free
15 to come before Your Honor.

16 THE COURT: That's the part that I -- I mean,
17 there are a number of things that I don't understand about
18 the objections and that was one of them. That given that
19 there's a mechanism, an escape ballot if you will, I didn't
20 understand why that doesn't suffice. Secondly, the
21 indication of Stern versus Marshall and not Arkinson
22 continues to amaze. It's got nothing whatsoever to do with
23 this. Zero.

24 MR. DEFILIPPO: Thank you, Your Honor, I can skip
25 much of this presentation.

1 THE COURT: Please.

2 MR. DEFILIPPO: And one of the corollaries --

3 THE COURT: I mean, you folks can attempt to
4 convince me that it does if you like, but my view is that it
5 didn't -- when it was just Stern versus Marshall and it
6 super doesn't now that the Supreme Court has weighed in
7 again in Arkinson, so.

8 MR. DEFILIPPO: I think it just confuses the
9 Court's power to enter an order in the Chapter 11 case with
10 the Court's power to enter a final judgment in a non-core
11 adversary proceeding. This is --

12 THE COURT: It's got nothing --

13 MR. DEFILIPPO: -- part of the administrative of
14 the case.

15 THE COURT: Right.

16 MR. DEFILIPPO: So this is a contested matter
17 under Rule 9014, and to the extent objectors have argued
18 that Your Honor can't reach them on this motion, Your Honor
19 has nationwide jurisdiction over anyone with minimum
20 contacts with the U.S. in a contested matter. I don't need
21 to spend a lot of time on that.

22 We are asking you to do what's been done before in
23 this case, which is we've cited to Your Honor cases that say
24 it's the law of the case. We believe we've established that
25 the scope of the Court's post confirmation jurisdiction is

1 broad enough to allow this order to be entered.

2 The DPH case, the Second Circuit expressly adopted
3 the close nexus test for post-confirmation jurisdiction and
4 found that it existed because resolution of the dispute in
5 that case would impact the implementation, execution, and
6 administration of the confirmed plan.

7 In Allegiance Telecom, Judge Drain exercised
8 jurisdiction over the post-confirmation effort by the plan
9 administrator to recover assets. There's been a reservation
10 of jurisdiction, a very broad reservation in the plan.
11 8.1.4(b) of the plan in paragraph 79 of the confirmation
12 order reserved the debtors' right to prosecute
13 indemnification claims.

14 Section 6 of the plan -- Article 6 of the plan
15 says in 6.1(b)(3) and (b)(4) that the plan administrator is
16 to liquidate all assets including prosecuting liquidation
17 claims. 8.3, the plan says the plan administrator is to
18 make distributions of available cash semi-annually including
19 cash augmented by post-confirmation recoveries.

20 And Article 14 contains the broad reservation of
21 jurisdiction or for all matters arising under, arising out
22 of, or related to the Chapter 11 cases.

23 This is a liquidating plan and in Eastern Airlines
24 Judge Lifland opined that the scope of post-confirmation
25 jurisdiction and liquidating cases is broader than in a

1 reorganized debtors' case, where the debtor operates,
2 expecting that the Court would be involved in post-
3 confirmation efforts to liquidate the assets. None of the
4 objectors have even mentioned the Eastern case in their
5 objections. And this motion is the first step in the plan
6 administrator's efforts to liquidate these recently accrued
7 causes of action.

8 The Chris case is helpful from the district court.
9 District Judge Lynch found that the close nexus test was
10 satisfied because the liquidating trust was given power to
11 prosecute the claims that were transferred to it under the
12 plan. It's virtually indistinguishable from this case.

13 So, Your Honor, Park Avenue Radiologists, the case
14 that one of the objector cites is distinguishable, because
15 the post confirmation debtor was not proposing the share the
16 proceeds of the action with the creditors. The sources of
17 the Court's power to grant this motion include the standing
18 order, which allows the Court to direct mediation of
19 adversary proceedings, contested matters or other disputes.

20 And in order to give all of the words of that
21 order their proper meaning, Your Honor, you must find that
22 other disputes includes matters that are not the subject of
23 either adversary proceedings or contested matters, like
24 these recently approved claims.

25 In addition, the order is entered in this case and

1 other similar proceedings can be relied on by Your Honor,
2 and Section 105 which everyone seems to belittle, but the
3 Court in the Efedra (ph) case actually used to implement a
4 similar type of procedure.

5 Some of the sellers contend forcing them to
6 mediate violates due process, but they confuse arbitration
7 with mediation. And if you look at the Woods case from the
8 Fifth Circuit, which we cited in our response, that and many
9 other cases like it hold that the power to mediate, that the
10 power to direct mediation does not infringe on due process
11 rights, while the power to arbitrate, the power to direct
12 arbitration may, but there's a meaningful distinction
13 between non-binding mediation and arbitration.

14 We agree, you can't force someone to arbitrate,
15 but you can force them to mediate. Nothing that can happen
16 in the mediation to any of the sellers, that they did not
17 consent to happen, other than having to mediate can take
18 place. And as you noted, they can get out.

19 They'll get all the information they need to allow
20 them to respond to our claims when we file the first notice.
21 And I'm baffled by the argument that we have to sue them
22 before you can direct them to mediate. Nobody has cited a
23 case in support of that proposition, and they disregard the
24 three words, "or other disputes" in the standing order,
25 which I just mentioned.

1 So if Your Honor is --

2 THE COURT: Why don't I hear from some of the
3 objectors.

4 MR. DEFILIPPO: All right.

5 THE COURT: I think that your reply did a good job
6 of categorizing the different objections, so let me hear
7 from each of them if you wouldn't mind.

8 MR. DEFILIPPO: Thank you, Your Honor.

9 THE COURT: Good morning.

10 MR. STEIN: Good morning, Your Honor, Philip Stein
11 on behalf of seven of the objectors, Universal American
12 Mortgage Company LLC, Standard Pacific Mortgage, Inc., Shay
13 Mortgage, Inc., CTX Mortgage Company LLC, Prime Lending,
14 Allied Mortgage Group, Inc., and Direct Mortgage Corp.

15 THE COURT: Okay.

16 MR. STEIN: Your Honor, I will dispense with any
17 Stern versus Marshall argument, but what I would like to
18 tell you is that what you first heard -- one of the initial
19 comments by the debtors' counsel, and indeed something that
20 was stated at length in their moving papers, is that
21 essentially that they -- the debtors face a monumental task,
22 a Herculean task with perhaps 1,100 lenders and as many
23 3,000 loans or more at issue.

24 I think what the -- what Your Honor needs to
25 recognize if you don't already is that they've faced exactly

1 the same task, except red larger for the last five years and
2 have handled it quite differently.

3 At least 1,110 lenders or thereabouts, and far
4 more than 3,000 loans have been put forward by the debtors
5 in courts all across the country, federal and state courts.

6 THE COURT: But I'm not -- this is not going to be
7 a, you know, Moroccan bizarre where you're going to try to
8 convince me that you've got a better idea. They're the
9 fiduciary, they proposed a procedure that's worked
10 structurally so to speak with respect to other large groups
11 of claims in these cases.

12 So I want to hear about why what they've proposed
13 I can't order, because it has worked and it's worked well,
14 and now they've come back again promptly upon the accrual of
15 these indemnification claims subsequent to the settlement
16 with Fannie and Freddie.

17 So what is it about -- other than the fact that
18 you don't want to do it, you would rather put them to the
19 expense of filing the lawsuits than having to respond to the
20 mediation notice and engage in what frankly is the more
21 minimal activity involved with participating in the
22 mediation program. And then if that doesn't work, if they
23 elect to proceed, they will sue you.

24 But we're talking about very narrowly
25 circumscribed, cost-efficient, nonburdensome procedures that

1 are tailored for this situation. And other than the fact
2 that you just would rather them have to sue you, well,
3 what's your objection?

4 MR. STEIN: Your Honor, they're not more minimal
5 for the parties to which they're directed. Many of those
6 parties are already facing claims, pending claims, current
7 claims by Lehman Brothers Holdings, Inc. in other courts
8 across the country. We now are faced with the specter of
9 dealing with them on multiple fronts. This one being a
10 particularly inconvenient one for my clients.

11 THE COURT: But so they would have to sue you
12 again. In other words, I don't -- I can't get past the
13 Lehman has a dispute with you, they make you aware of a
14 dispute. Either they make you aware of the dispute because
15 they file a complaint against you that requires you to
16 answer or to move to dismiss it and/or engage in discovery,
17 or they put you in this mediation program, they send you a
18 notice, and you respond to the notice. Either by saying, my
19 claim was settled, we think we shouldn't have to do this,
20 we're going to write a letter to the Judge, et cetera.

21 Action/reaction. I just -- I'm sorry, and I don't
22 mean to be difficult, I just don't understand the difference
23 in those two worlds, other than the fact that you would
24 rather they have to spend more money and launch more
25 litigations because that's more burdensome on them, so

1 burden on them is a disincentive for them to come after you.

2 But that's not the way it works.

3 MR. STEIN: Your Honor, we, the targets of the
4 motion would rather spend less money ourselves, we're not
5 focused on how many money Lehman is spending, we're focused
6 on how much money we're spending.

7 THE COURT: And I understand that. And I just
8 outlined for you why in the scenario in which the ADR is
9 implemented, I'm not seeing the defendants, the punitive
10 defendants having to spend a lot of money. I just -- I
11 don't see it.

12 MR. STEIN: Okay. Well, let's talk about the
13 process itself, and what it is they're advocating. While
14 it's correct, as was suggested to you earlier that we're not
15 here to discuss the substantive merits of the claim, I think
16 one thing Your Honor does need to factor in in evaluating
17 what's being requested here is kind of the track record of
18 where we stand today.

19 These claims are almost certainly time barred,
20 notwithstanding the fact that they're being presented to you
21 as new indemnification claims that only accrued once they
22 reached the settlement with Fannie or Freddie Mac.

23 When a particular variation of the statute of
24 limitations argument has been made in cases brought by
25 Lehman and adjudicated by federal and state courts thus far,

1 every single time that that argument has been made and ruled
2 upon, the claims have been dismissed as time barred.

3 To have to come forward in this case --

4 THE COURT: You have a case under New York law
5 that says that indemnification claims don't arise when --
6 don't accrue once the underlying claims are paid.

7 MR. STEIN: Your Honor, I'm aware of at least
8 eight that have been decided that way in recent months, yes.
9 We're happy to supplement the briefing on that point if Your
10 Honor deems it necessary. But that's --

11 THE COURT: So that if that's your position, then
12 using the, what I'll call the escape hatch mechanism, you
13 would simply write a letter that cites that authority, and
14 ask me to let you out on that basis.

15 MR. STEIN: Well -- and if Your Honor is going to
16 be receptive to those types of entreaties, that may make
17 things very different, although we are reluctant, just as a
18 threshold matter to be pulled in a little bit deeper, and to
19 have --

20 THE COURT: So once again, you would rather they
21 sue you and then you have to file a motion to dismiss on the
22 basis that it's time barred, as opposed to taking me up on
23 my suggestion that you simply send me a letter that says
24 that. In other ADR procedures that we have going certain
25 claimants have made the argument, or other litigation

1 procedures rather, that folks don't want to be a part of it
2 because they're not subject to the personal jurisdiction of
3 the court because they're foreign.

4 Similarly, they were given an opportunity in an
5 efficient cost effective way to bring that to the Court's
6 attention. So, Mr. DeFilippo, unless you're going to tell
7 me I'm making this up, then problem solved, right.

8 MR. DEFILIPPO: Your Honor, I clearly see which
9 way the Court is leaning and I understand that.

10 THE COURT: But you --

11 MR. DEFILIPPO: Let me mention a couple of points.

12 THE COURT: But we're not -- but this is not here
13 -- we're not here -- I mean, we are here because we enjoy
14 doing this, but you haven't explained to me why that doesn't
15 work.

16 MR. DEFILIPPO: Let me try a couple of other
17 points. The first, Your Honor, is that it's the supposition
18 of at least my clients, perhaps the clients and other
19 objectors -- of other objectors' counsel I should say, that
20 if not brought into this proceeding, if not brought into
21 this mandatory ADR mechanism, those suits that you're
22 positing will be filed won't be filed, at least as to
23 certain defendants.

24 In other words, this is their shot, trying to make
25 us come here, trying to build momentum for some sort of

1 settlement through a process administered by this Court is
2 what they're going to do in lieu of filing additional claims
3 that they think might be futile again, at least as to
4 certain defendants.

5 So that's a bit of the problem here. And that --
6 you know, maybe that supposition will prove to be correct,
7 maybe it will prove to be incorrect, but that is the working
8 supposition for -- at least for my clients.

9 The process itself also is something to which we
10 object, independent of whether we should come forward and be
11 brought into this process. It's the particulars of the
12 process that give us pause.

13 THE COURT: Such as?

14 MR. DEFILIPPO: Such as the fact that they select
15 the mediator in a --

16 THE COURT: There's a huge pool of mediators --

17 MR. DEFILIPPO: There's a huge --

18 THE COURT: -- comprised of practitioners, retired
19 practitioners, retired judges, it's a non-binding mediation.
20 I just -- there just seems to be this sense that permeates
21 the objections that the deck is stacked against the other
22 parties, that has not been the experience.

23 I just -- I don't understand that.

24 MR. DEFILIPPO: Well, Your Honor, we certainly
25 hope our skepticism will prove to be unfounded and maybe it

1 will. But it's not the pool of mediators to which we
2 object, it's the fact that they get to select one from the
3 pool, and then we pay with them for the mediator they've
4 selected.

5 There are deadlines that are far more onerous on
6 us than they are on them, with respect to provision of
7 information. There are concerns that we have just about the
8 way this is being laid out in the moving papers.

9 THE COURT: So the selection of somebody from a
10 pool it's not a case where they're going to be -- someone's
11 going to call their brother-in-law, and say come and mediate
12 this dispute. So that really doesn't move me very much.

13 With respect to deadlines, if there are -- in any
14 case, if there are particular impediments to satisfying a
15 deadline, once again you don't lose your voice, you have the
16 ability to have a conversation, and arrive at a reasonable
17 accommodation.

18 This is all about reasonableness and efficiency.
19 So if a particular set of time frames doesn't work for a
20 particular set of reasons, you can complain about that.

21 MR. DEFILIPPO: Your Honor, I guess I will
22 conclude by saying that there's nothing that is stopping
23 these -- stopping Lehman Brothers Holdings, just as nothing
24 stopped them in the past five years from filing suits in
25 federal and state courts across the country from seeking

1 independent of this court and the process --

2 THE COURT: They didn't --

3 MR. DEFILIPPO: -- administered by this Court to
4 draw us into mediation, to select jointly with us a mediator
5 for any future claims. They are trying to ensure that
6 things are done in their way. And ADR is, as Your Honor's
7 aware, generally thought to be a consensual mutual process.
8 This is neither consensual nor mutual. We are being told
9 rather than calling us up, people they've litigated against
10 over the past several years, and saying, would you like to
11 mediate with us in a forum convenient to both of us, would
12 you like to select a mediator with us, an inquiry to which
13 at least some of my clients I'm sure would respond
14 favorably, they're saying, here's a mandatory process in New
15 York administered by the bankruptcy court, we're going to
16 select the mediator --

17 THE COURT: Right.

18 MR. DEFILIPPO: -- you're going to pay for the
19 mediator along with us, come do it this way.

20 And, Your Honor, we certainly do not suggest that
21 you yourself are not fair-minded. What we're suggesting is
22 that this process being requested of you from -- by LBHI,
23 which may have worked as to certain other types of claims is
24 unnecessary instance, since they've certainly shown a
25 proclivity for filing exactly these types of claims in

1 forums all across the country other than this one. Why is
2 it that they now want everybody to come here, participate in
3 a process that they've set up, a process to which we object.

4 And, Your Honor, that's the nature of our
5 objection, thank you.

6 THE COURT: Thank you.

7 MR. WOLL: Your Honor, David Woll from Simpson
8 Thatcher, may I be heard for just a couple of minutes?

9 THE COURT: Yes, certainly.

10 MR. WOLL: Thank you. Your Honor, we represent
11 Mortgage It, one of the objectors. I just wanted to address
12 two categories of issues. One is our timing issues and the
13 second are some specific provisions of the order that
14 haven't been discussed yet.

15 With respect to timing, I think part of what has
16 gone on here is that my client along with 2 or 3,000 other I
17 guess sellers got this mailing and we're called to respond
18 to the motion --

19 THE COURT: Right.

20 MR. WOLL: -- in a case where we really haven't
21 been involved. We're relative strangers to these
22 proceedings.

23 So I take with, you know, certainly at face value
24 and great interest with the comments about what's transpired
25 before, but we really didn't know anything about that.

1 THE COURT: Okay.

2 MR. WOLL: And one of the proposals we had made to
3 LBHI was to adjourn the motion and give us more time to
4 discuss their proposal and to consider what's been
5 suggested.

6 THE COURT: But there is an agreement with two
7 other objectors to adjourn as to them, so that deal is on
8 the table for you.

9 MR. WOLL: Well, so here's the rock and the hard
10 place, which is why I'm here, and which is what I discussed
11 with my client, we weren't sure exactly how to proceed.

12 We did talk about adjourning the motion and our
13 objection with respect to our objection. And we were
14 willing to do that, but LBHI told us we want to get the
15 order entered with respect to the 2,500 other people.

16 THE COURT: Sure.

17 MR. WOLL: Yeah, okay, fine, I understand. But we
18 were concerned that having -- the Court having entered the
19 order with respect to all these other people on an
20 uncontested basis that our ability to argue a month from now
21 that it shouldn't apply to us --

22 THE COURT: Well then what --

23 MR. WOLL: -- would somehow be compromised.

24 THE COURT: What would be the meaning of the
25 adjournment? An adjournment is you've objected so, you

1 know, we're going to get off the train and the train can
2 leave without us, and you're going to -- I mean, that's what
3 an adjournment does, right?

4 MR. WOLL: Right, Your Honor. We just -- I was
5 just concerned that something would happen here that would
6 preclude our arguments at the later adjournment date.

7 THE COURT: Mr. DeFilippo, am I missing something?

8 MR. DEFILIPPO: No, the stipulation reserves
9 everybody's rights who agreed to an adjournment.

10 THE COURT: So do you want to --

11 MR. WOLL: We'll stipulate to adjourn, Your Honor.

12 THE COURT: -- stipulate to an adjournment? Okay.
13 Very good.

14 MR. WOLL: Thank you.

15 THE COURT: By the way, I put the stipulation -- I
16 put the adjournment back on the table to any of you subject
17 to Mr. DeFilippo overruling me.

18 MR. DEFILIPPO: We're fine, Your Honor.

19 THE COURT: Yes?

20 MR. WRIGHT: Good morning, Your Honor, Derrick
21 Wright (ph) and I'm here on behalf of 15 potential
22 defendants, and for the record --

23 THE COURT: Okay.

24 MR. WRIGHT: -- I'd like to state that First
25 California Mortgage Corporate, Mountain West Financial,

1 Inc., Republic Mortgage Home Loans, Sun American Mortgage
2 Company, Sterling National Mortgage Company, Inc., W. R.
3 Starkey Mortgage LLP, Gateway Funding, Diversified Mortgage
4 Services, Arlington Capital Mortgage Corporation, Loan
5 Simple, Inc., New Fed Mortgage Corporation, Broadview
6 Mortgage Corporation, First Option Mortgage, AmeriFirst
7 Financial Corporation, Parole Mortgage (ph), Seminitch
8 Corporation (ph).

9 THE COURT: Okay.

10 MR. WRIGHT: Your Honor, to your last point, we
11 have also have had conversations with counsel for LBHI
12 regarding adjournment, and we are, in fact, amenable to
13 that, and believe that there would be great value in
14 continuing discussions.

15 We too had concerns with how this proceeding would
16 take place, and if the order was entered as to the 2,500
17 some other parties and in fact certain objections did go
18 forward, we thought there could be potential prejudice down
19 the road if Your Honor was interested in, for example, the
20 uniform set of arbitration procedures.

21 Because one thing we did discuss --

22 THE COURT: We're not arbitrating, we're
23 mediating.

24 MR. WRIGHT: Mediation procedures --

25 THE COURT: Okay.

1 MR. WRIGHT: -- I apologize, Your Honor.

2 THE COURT: Okay.

3 MR. WRIGHT: And one thing I would like to address
4 today is that we do have some specific concerns. I think
5 some have been raised today but with the actual procedures.
6 And I know that's what's called for in the general order,
7 but for example, holding all the mediations in New York, I
8 think is a big concern for our clients.

9 Our clients, several of which, are involved in
10 pending litigations, mostly on the West -- out West, to come
11 to New York, rather than at a minimum, be allowed to
12 participate by telephone, which is something that we've
13 raised.

14 We think that at the end of the day, Your Honor,
15 our clients as we discussed earlier our concern with the
16 financial consequences. And I think in cases where they are
17 already pending litigation, I think that some of the
18 plaintiff's arguments as to, you know, that this is a cost
19 saving mechanism, and that these are going to be costs that
20 are saved on both sides really doesn't apply in those cases,
21 where in fact, in one of the cases, there's been a final
22 order entered in our favor, and it's on appeal.

23 In other words, to now initiate a new process,
24 putting aside jurisdiction and some other issues that have
25 been raised, just from the straight cost perspective, and

1 it's one thing that we've raised with counsel. And again,
2 we can discuss separately and if we are in a -- you know, if
3 we adjourn as to us, and they discuss that, and they say, we
4 can carve out specific procedures potentially as to your
5 clients, but that was where our concern arose that if Your
6 Honor --

7 THE COURT: Well again, I -- my intention was the
8 vast, vast, vast 90 what percent majority of the potential
9 defendants or participants, depending upon your
10 perspective --

11 MR. WRIGHT: Uh-huh.

12 THE COURT: -- didn't object. So to the extent
13 that I can enter an order that takes care of most of them,
14 that's going to be great, and then you can continue your
15 discussions, and either you will resolve them or we'll come
16 back and do another round.

17 MR. WRIGHT: Understood. And as I discussed
18 previously, I think a lot of my clients are so situated that
19 we can resolve a lot of issues, or get clarity --

20 THE COURT: Okay.

21 MR. WRIGHT: -- and that's what we've wanted all
22 along. But just, I wanted to be clear --

23 THE COURT: So for today, so for any order that's
24 entered today, then the group of your clients will be carved
25 out and adjourned to another date.

1 MR. DEFILIPPO: Yes, Your Honor.

2 THE COURT: All right. Very good.

3 MR. WRIGHT: Thank you, Your Honor.

4 THE COURT: Thank you. Anyone else?

5 MR. GOLDSTEIN: Good morning, Your Honor, Arthur
6 Goldstein of --

7 THE COURT: Good morning.

8 MR. GOLDSTEIN: -- of Spizz Cohen & Serchuk
9 representing Securities -- Security National Mortgage
10 Company.

11 I've heard everything that's been argued here
12 today and I note with interest the Court's comment with
13 respect to reservation of rights for another day.

14 I would like a few minutes, if the Court doesn't
15 mind to contact my client to confirm whether they would
16 agree to that --

17 THE COURT: Certainly.

18 MR. GOLDSTEIN: -- and if not --

19 THE COURT: Okay.

20 MR. GOLDSTEIN: -- I would like to reserve the
21 right to come back up here and make additional comments with
22 respect to the motion.

23 THE COURT: Okay. Go right ahead.

24 MR. GOLDSTEIN: Thank you, Your Honor.

25 THE COURT: Anyone else?

1 MS. SOMERS: Good morning, Your Honor.

2 THE COURT: Good morning.

3 MS. SOMERS: My name is Tessa Somers, Weiner
4 Brodsky Kider P.C., and I'm here on behalf of defendant or
5 rather non-party Day Time Mortgage Corporation, objector.

6 Your Honor, I just wanted to address a couple of
7 things that were mentioned earlier. First off, the idea
8 that this has worked in the past, I believe that to be true,
9 but I want to distinguish the Residential Funding case,
10 because I was cited as an example of where this worked.

11 In that case, it was actually creditors who were
12 working out a plan, so it wasn't quite the same, and in
13 fact, later in that same case, some of the objectors I know
14 are involved in adversary proceedings --

15 THE COURT: Okay.

16 MS. SOMERS: -- in the very same case, and it's
17 similar to indemnification claims, its repurchase, that sort
18 of thing.

19 So in that instance, they actually went the route
20 of pleading it out under Rule 8 and giving everyone notice.
21 And that's really where I want go with this is notice.

22 THE COURT: But the procedures -- I read that part
23 of the objections, and I don't think anyone would suggest
24 that you have all the notice that you're going to get at
25 this point, but as the procedures get underway, there will

1 be notice and before you're obligated to respond to
2 anything, expend resources, take action, the procedures made
3 clear to me, that there will be a notice that will
4 consistent with whatever due process rights you have at this
5 point, which I'm not sure is the final panoply of due
6 process rights, but we don't have to go there, that you will
7 get notice. You're not going to be forced to respond to a
8 blanket statement that, you know, we have a claim against
9 you, please come and defend.

10 MS. SOMERS: Right, that's true that they're going
11 to provide an ADR notice I think is what they term it, and
12 they say that will provide sufficient information for you to
13 know about what's going on.

14 And whether or not -- it doesn't lay out what
15 information will actually be provided, and whether there's a
16 way to object. I mean, there's no pleading standard
17 necessarily then --

18 THE COURT: Sure.

19 MS. SOMERS: -- you know, the civil rules don't
20 apply so.

21 THE COURT: Right. But there's common sense and
22 there's the ability to complain here if for some reason that
23 notice isn't sufficient. What I would imagine it would say
24 would be, at a minimum, to describe the paper, if you will,
25 that the claim involves. I mean, they -- because they have

1 to do this on a loan specific basis, they're going to have
2 to be loan specific I would think in the notices. So that
3 is going to tell you a lot about what it is that they are --
4 want to talk about in the process.

5 MS. SOMERS: I agree, Your Honor, and loan
6 specific would be a necessity for us to be able to defend or
7 to mediate on this issue.

8 THE COURT: I'm getting a nod. I'm getting a nod.

9 MR. DEFILIPPO: I think that's the intent, Your
10 Honor.

11 THE COURT: I think the intent is that the notices
12 are going to be loan specific.

13 MR. DEFILIPPO: Yes, Your Honor, they are.

14 MS. SOMERS: Well, that is very reassuring indeed.

15 THE COURT: Okay. Good.

16 MS. SOMERS: On top of that, I do want to
17 highlight that in their response to our objections, they say
18 erroneously, that there's just basically no way that you can
19 have a technical default and have sanctions applied to you.
20 That's simply not true.

21 And 3,000 notices presumably were sent out about
22 this particular motion, and only 26 objectors appeared. I
23 think that shows you that either people don't mind, and that
24 could be part of it, or that they didn't get the notice, or
25 they didn't understand that it was important to them.

1 But if you go then to this idea that they can send
2 an ADR notice later to all of these 3,000 people, and if you
3 don't respond timely, not even if you don't respond, but if
4 you don't respond timely, they can move for sanctions
5 including fees of the mediator, and other sanctions --

6 THE COURT: Well, you're not here pleading the
7 case of those other 3,000, right. You're just here for your
8 client, right?

9 MS. SOMERS: I am just here for my client. But I
10 would submit that our --

11 THE COURT: So they're going to be --

12 MS. SOMERS: -- arguments would apply.

13 THE COURT: They're going to be looking out for
14 notice, right?

15 MS. SOMERS: Well, I -- well, certainly, we will
16 and we're on notice too --

17 THE COURT: Right.

18 MS. SOMERS: -- and so hopefully we will get a
19 copy of that.

20 THE COURT: But they don't get to automatically
21 impose sanctions, they just get to ask, which sometimes
22 asking --

23 MS. SOMERS: That's true, they do have to seek --

24 THE COURT: -- for sanctions has a way of
25 sharpening someone's focus in getting them to not throw

1 notice in the -- you know, in the waste bin or what have
2 you. So that --

3 MS. SOMERS: Certainly. As long as the sanctions
4 aren't applied because of a technical default. You know,
5 this is somebody who got the notice but we didn't understand
6 it doesn't respond until a week after it's due, and
7 sanctions could be sought because technically that's a
8 default.

9 THE COURT: But they might not be awarded, right?

10 MS. SOMERS: They might not be awarded, that's
11 true, and I would hope they wouldn't be awarded, but I can't
12 say that's for sure the case.

13 And so with that in mind, we would object that the
14 notice either as it's sent or as it's pled, we aren't sure
15 that it's going to be sufficient to be able to defend
16 ourself. And I understand, loan-by-loan, that's great, and
17 now I understand I can come to you and I can alert you if
18 it's not sufficient for our purposes.

19 THE COURT: I mean, it's not -- you know, the
20 thing that I want to be clear, I mean, what I'm going to
21 authorize, and I am going to authorize this today, it's not
22 a game of gotcha. This is not a game of gotcha. It's not
23 inviting you to a -- you know, a rigged game, a non-level
24 playing field. That's the way I view it.

25 And I think a lot of the objections have proceeded

1 from a dark place, from a place that assumes that there's
2 going to be misbehavior. And I don't view the world that
3 way.

4 So if a notice -- if someone's on vacation, and
5 the notice doesn't get, you know, opened on a timely
6 fashion, there's not going to be a negative consequence of
7 that. And I'm sure steps will be undertaken, you know, we
8 all get those things in the mail that say time sensitive,
9 you know, open at once, that this is going to have some
10 indication that it's not something that ought to be thrown
11 away so.

12 MS. SOMERS: Well, I think you're right, Your
13 Honor, that we might come from this from a little darker
14 place than you do, but it's partly informed by having gone
15 back and compared some of their prior -- because this has
16 happened, I take it, previously where they filed motions for
17 ADR orders, and they've been granted. But those orders did
18 differ in material ways from the one that we have where --
19 and I highlight, I think, the last section of our objections
20 talks about, there's a section at the beginning of the order
21 that says, "I hereby --" you know, I found and affirm that
22 this is the case, and then it lays out a bunch of items that
23 we wouldn't necessarily want to have been found and affirmed
24 by the Court without having actually worked them out
25 including venue, you know, jurisdiction.

1 But among other things, there's also -- I believe
2 there's one about, you know, this is a core matter, or this
3 is a close nexus to the events that have happened.

4 THE COURT: Well, but the close nexus finding is
5 part of the predicate for my having the ability to order the
6 mediation. But that doesn't prejudice any arguments. For
7 example, I've not really invited a lot of discussion about
8 Stern versus Marshall, but to the extent that if and when
9 you ever got to the merits of a claim, if you felt you had a
10 Stern versus Marshall argument, it's totally this order will
11 totally not prejudice your ability to make that argument
12 then.

13 So that close nexus finding solely has to do with
14 the ADR, has no bearing, afforded no weight ultimately if
15 and when we would ever get to the merits of these suits, so
16 you're protected in that regard.

17 MS. SOMERS: Okay. Well -- and that's hopeful
18 too.

19 THE COURT: Okay.

20 MS. SOMERS: That's another section where it's
21 ordered and affirmed that this is the case. And I believe
22 that LBHI has committed to amending some of the language to
23 explicitly preserve all rights, all defenses, all --

24 THE COURT: Sure.

25 MS. SOMERS: And so as long as we can get that in

1 there, I think --

2 THE COURT: Absolutely.

3 MS. SOMERS: -- that will help us along the road
4 to agreeing to this.

5 THE COURT: Never -- that was never a question in
6 my mind to the extent --

7 MS. SOMERS: So that's one of the -- sorry.

8 THE COURT: It was a lot of -- a couple of the
9 objections raised that, and that's not on the table, you're
10 not waiving any rights by participating in mediation.

11 MS. SOMERS: Well, and that was something that had
12 been removed from prior motions of theirs. So seeing sort
13 of this progression from motion-to-motion and then to ours
14 where they've removed some of these safeguards, they've
15 added in that we have to pay for the mediator. You know, it
16 sort of -- it led us to a dark place --

17 THE COURT: Okay.

18 MS. SOMERS: -- where we questioned where this was
19 going.

20 So it's certainly good to get some reassurances
21 this morning from you. We didn't want to wait a month and
22 then have found out subsequent --

23 THE COURT: Sure.

24 MS. SOMERS: -- that we should've known now.

25 THE COURT: Okay.

1 MS. SOMERS: So --

2 THE COURT: All right. So why don't you go ahead
3 and confer with Mr. DeFilippo particularly with respect to
4 the reservation of rights, and any of these other fine
5 points that you think, you know, need to be clarified in a
6 word -- written word sense.

7 MS. SOMERS: Very good. Thank you, Your Honor.

8 THE COURT: All right? Thank you.

9 MS. SOMERS: Thank you.

10 THE COURT: Anyone else?

11 MR. SALTER: Good morning, Judge.

12 THE COURT: Good morning.

13 MR. SALTER: Tim Salter (ph), Blank Rome for
14 Sterns Lending, Inc. We had talked to opposing counsel
15 about an adjournment. We had some of the same concerns the
16 other objectors did. It's good to see where the Court is
17 leaning on this, and we're going to, I guess, agree to that
18 adjournment now, our objection --

19 THE COURT: Okay. Mr. DeFilippo, is that okay?

20 MR. DEFILIPPO: Yes, Your Honor. Anyone that
21 wants it, gets it.

22 THE COURT: Okay. All right. I think we're
23 getting to the end. Anyone else?

24 MS. SOMERS: Your Honor, Tessa Somers again --

25 THE COURT: Yeah.

1 MS. SOMERS: -- on behalf of DHI, I'm sorry. I'd
2 just like to clarify that I'd like to have permission to
3 adjourn, just so that we can actually go over a draft and
4 kind of work with LBHI on something that we can agree with,
5 rather than be covered by it, and just to carve out for us
6 today as well.

7 MR. DEFILIPPO: Yes.

8 THE COURT: Is that all right, Mr. DeFilippo?

9 MR. DEFILIPPO: Yes, Your Honor, yes.

10 THE COURT: Okay. I hope someone is keeping score
11 on all this --

12 MS. SOMERS: Thank you, Your Honor.

13 THE COURT: -- because I'm not.

14 MR. DEFILIPPO: We're assuming they're all going
15 to get the 30 days, right?

16 THE COURT: Whatever you folks work out. But I
17 think --

18 UNIDENTIFIED: I would just like to adjourn for
19 like ten minutes, so I can just reach out to my client to
20 confirm I have the authority.

21 THE COURT: Okay. But I have to get the -- I have
22 to get the Credencial people up here and out. So, Mr.
23 Stein, though, you don't want to adjourn?

24 MR. STEIN: No, Your Honor, I would like to
25 adjourn if we're going to work on clarifying procedures and

1 getting something that's more palatable to us so we don't
2 have to come back and bother you again with this, that's
3 fine.

4 THE COURT: Okay. So I'm hearing that that's
5 fine. Okay. So I'm going to give you your ten minutes, and
6 I'm going to be optimistic and assume that you're going to
7 get the authority to participate in this adjourned group.

8 UNIDENTIFIED: Yes.

9 THE COURT: And that you're all -- so, Mr.
10 DeFilippo, what is it that you're going to -- are you going
11 to give me an order today that reflects some of the things
12 that we've talked about?

13 MR. DEFILIPPO: Yes, Your Honor.

14 THE COURT: And then --

15 MR. DEFILIPPO: Stipulate with the others.

16 THE COURT: -- stipulate with the others, and then
17 perhaps give me an amended or a schedule or something that
18 brings in everyone who's being carved out of today.

19 MR. DEFILIPPO: Correct, Your Honor.

20 THE COURT: All right. Does anyone else wish to
21 be heard with respect to the ADR motion regarding the
22 indemnification claims?

23 (No response)

24 THE COURT: All right. Thank you all very much.

25 UNIDENTIFIED: Thank you, Your Honor.

1 (Pause)

2 THE COURT: All right. Could I have the
3 Credencial group come on up.

4 MR. BENTON: Good morning, Your Honor.

5 THE COURT: Thank you for agreeing to be pushed to
6 the end.

7 MR. BENTON: No problem.

8 THE COURT: I was trying to figure out who might
9 take a shorter period of time.

10 We've been -- we've experienced an uptick in
11 activity in the Lehman case since my wonderful predecessor
12 departed. So we're trying very hard to manage the calendar,
13 so that there's not a lot of time spent sitting around. So,
14 Ms. Lutkus (ph) is going to be taking an active role in
15 working with all of your folks to keep an eye on the
16 calendar and just make sure that we get -- we move things
17 along. We're not going to limit you to omnibus days. We're
18 going to fill the omnibus days with a manageable amount of
19 matters, but I'm going to continue to give you extra days,
20 as much as everybody needs.

21 But we're very interested in efficiency, moving
22 you along, and not having, you know, 18 matters on one day
23 where I can't be fully focused and give you resolution.

24 MR. BENTON: And that's very much appreciated,
25 Your Honor, and we -- I can say we --

1 THE COURT: Not that the way that Judge Peck did
2 things wasn't absolutely perfect in every way.

3 MR. BENTON: No, and I very much appreciate how he
4 did it. But, of course, we also want to be efficient and if
5 there are -- and I can say for certain, that if there are
6 times when the schedule is filling up too much or if the --

7 THE COURT: Right, right.

8 MR. BENTON: -- that we want to work with the
9 Court.

10 THE COURT: Right.

11 MR. BENTON: And with everyone to make sure it
12 gets done efficiently.

13 THE COURT: Right. And Ms. Lutkus has been
14 charged with being the time czar. So she will be watching
15 it very closely.

16 MR. BENTON: Will do.

17 THE COURT: Okay. All right.

18 MR. BENTON: So good morning again, Your Honor.

19 THE COURT: Good morning again.

20 MR. BENTON: Jason Benton, Hughes Hubbard and
21 Reed, counsel for the LBI trustee.

22 The final item for this morning is the trustee's
23 210th omnibus objection to the claims of Credencial and
24 Minicreditos and Carlos Gorleri. And this objection has now
25 been fully briefed by the parties.

1 At the outset, Your Honor, I should say that the
2 parties are working cooperatively together, we were able to
3 come to a stipulation on the three claims, which Your Honor
4 so ordered yesterday, which consolidated or maybe I should
5 say smushed the three claims into one. And with the
6 reservations outlined in the stipulation, and also thereby
7 have the effect of dropping the secured elements of the
8 claims.

9 Therefore, I don't plan to address the secured --

10 THE COURT: Okay.

11 MR. BENTON: -- elements.

12 THE COURT: That was going to -- I was going to --
13 that was going to be my first question in the category of
14 low hanging fruit.

15 MR. BENTON: Yeah, so I think that's -- you know,
16 that's off, Your Honor, and I do apologize if I --
17 definitely I'm going to mess up some plurals when I say
18 claim or claims.

19 THE COURT: That's fine, got it.

20 MR. BENTON: So the issue has been fully briefed.
21 In the interest of time, unless Your Honor wants to proceed
22 differently, I do not plan to repeat the arguments that have
23 been made.

24 THE COURT: Let me -- just help me again since I'm
25 still relatively new at this case, this is a sufficiency

1 hearing.

2 MR. BENTON: Yes, Your Honor.

3 THE COURT: Okay. So say out loud for me what
4 that means.

5 MR. BENTON: A sufficiency hearing under the ADR
6 procedures, and I apologize, I don't have the exact
7 provision in hand is if the -- if a --

8 THE COURT: It's a 12(b)(6), right?

9 MR. BENTON: Right, it's a 12(b)(6), it's a motion
10 to this standard. It's modeled on the ADR procedures that
11 LBHI put in place.

12 THE COURT: Right.

13 MR. BENTON: There are difference between the --

14 THE COURT: Right.

15 MR. BENTON: -- two procedures.

16 THE COURT: But it's basically the same thing.

17 MR. BENTON: Yes, that's right.

18 THE COURT: And it's a 12(b)(6) standard.

19 MR. BENTON: Yes, that's right, and I've spoken to
20 my adversary, Mr. Sher, and we agree on that.

21 THE COURT: So if -- just so to understand this,
22 so if I don't grant LBI's motion, then the next thing that
23 would happen would be it would be a case, it would --

24 MR. BENTON: It would be a case, but it would be
25 subject still to the ADR procedures, Your Honor. So if all

1 or some portion of the claim survived the motion to dismiss,
2 or the sufficiency hearing, then the two -- it can go down
3 two paths. The one path is, we can serve on Mr. Sher, and I
4 can assure you that we have a good relationship, I would
5 talk to him about it.

6 THE COURT: Okay.

7 MR. BENTON: I could serve the notice of ADR
8 procedures, which essentially puts the case into the
9 mediation. Or we could set a claims hearing, a merits
10 hearing on it, and that's essentially it becomes a
11 litigation, we would devise a litigation schedule, submit it
12 to Your Honor, or if we couldn't agree, you would approve
13 one --

14 THE COURT: Right.

15 MR. BENTON: -- or come up with one, and then we
16 would proceed to a contested litigation.

17 THE COURT: To a contested litigation that would
18 either be an evidentiary hearing or possible cross motions
19 for summary judgment.

20 MR. BENTON: Exactly, Your Honor. And that would
21 obviously be part -- where the summary judgment motions
22 might come in, would be part of the scheduling, but yes,
23 exactly right.

24 THE COURT: Right, right. Okay. That's what I
25 thought, but it just -- I just wanted to make sure we're all

1 on the same page.

2 MR. BENTON: And that, by the way, Your Honor,
3 just in case, in general, I mean, that is how the procedures
4 will work. I mean, we will have more matters coming before
5 Your Honor --

6 THE COURT: Right.

7 MR. BENTON: -- for hearings, and I've had, I know
8 you've had the Cornell recently.

9 THE COURT: Right.

10 MR. BENTON: And if it comes to that initial
11 hearing, that is a sufficiency hearing.

12 THE COURT: Right.

13 MR. BENTON: Unless, unless the parties before
14 that hearing had already designated it as a merits hearings,
15 and then it becomes a --

16 THE COURT: Right. Right. I mean, based on our
17 own understanding, that's the conclusion we came to. It
18 wasn't crystal clear from the papers, so I just wanted to
19 make sure we were all on the same page.

20 MR. BENTON: Yes, no, no, no, that's not a -- and
21 I will take full blame, since I believe I've got my
22 signature at the bottom of those pages.

23 THE COURT: It's okay. All right.

24 MR. BENTON: So as I said, I don't plan to repeat
25 all of the arguments. I just want to emphasize what I think

1 are a few key points.

2 THE COURT: Okay.

3 MR. BENTON: It's not disputed that the most
4 important factor in the federal analysis, and in fact, under
5 any analysis including in the New York State cases is the
6 language of the purported contract.

7 THE COURT: Right.

8 MR. BENTON: And a very specific part of the
9 language of the work plan, in two different ways shows that
10 the Credencial parties claims should be dismissed as a
11 matter of law on its face. And it shouldn't be a surprise
12 given our papers that that's the termination provision
13 that's in the contract.

14 As an initial matter, the termination provision is
15 express recognition that the parties did not intend to bind
16 themselves necessarily to the ultimate transaction. It
17 provides that if all of the definitive transactions that are
18 outlined in the work plan, are not entered into by a date
19 certain and we can get to it later. I know there's a little
20 bit of a dispute about what that particular date certain is,
21 but if those were not all entered into by a date certain,
22 and no one disputes that those agreements were never entered
23 into, then the work plan would cease to apply.

24 Simply put, the work plan on its face recognize
25 the possibility that the parties' negotiations might fail.

1 And that is simply completely inconsistent with the notion
2 that the work plan could be the binding agreement to the
3 ultimate transaction. And the case law recognizes this.

4 For example, the Second Circuit I believe in the
5 Arcadian case mentioned that where the agreement at issue
6 described the failure, the possibility of a failure to
7 negotiate, it can't be a binding type one. In a way, the
8 work plan contains the seeds of its own destruction.

9 So in that way, the termination provision shows as
10 a matter of law on its face, that it cannot be a binding
11 type one, and the other factors do too, but we've briefed
12 those.

13 The second thing the termination provision shows
14 is whether or not, whether or not it is a Type 1 or a Type 2
15 agreement. There's no plausible allegation that there could
16 have been a breach. And they've made no allegations that
17 there was a breach prior to the termination date.

18 In fact, all of the -- many of the allegations
19 they've made is, for example, in support of their promissory
20 estoppel and various other arguments is that we continued to
21 work with them. We continued to negotiate drafts, we
22 continued to have conference calls with them.

23 Now, I think that that's a showing of good faith
24 frankly, but it's certainly not an allegation that there was
25 a breach prior to the termination date.

1 Now, under the termination provision, the
2 termination date was linked to the exclusivity period, which
3 was a four month period that ended on March 2nd, 2008. The
4 termination provision itself says that it could be extended,
5 but it only could be extended in writing.

6 The exclusivity period says that it could be
7 extended by mutual consent. Our interpretation, and I think
8 the only plausible interpretation of the termination
9 provision is that it could only be extended in writing. And
10 there is no writing extending the termination period.

11 So March 2nd by its terms, the work plan ceased to
12 exist. But let's -- the -- excuse me. The claimants have
13 made the argument that by continuing to negotiate the
14 drafts, providing these amendment to the loan on March 31st,
15 2008, that implicitly Lehman agreed to extend the
16 exclusivity period which dragged along the termination date
17 to a later period.

18 I don't dispute that there were negotiations, it
19 appears from the documents that went on after March 2nd.
20 There certainly wasn't an amendment after March 2nd. I
21 don't think that means the termination date was extended.
22 But even if we accept the theory that it was, even under
23 plaintiff's theory, the exclusivity period could only be
24 extended by mutual consent of the parties.

25 Once that mutual consent was over, no party was

1 under any obligation whatever the obligations that were
2 created the work plan were.

3 And what they say is Lehman's breach, both of the
4 Type 1 and of the Type 2, is Lehman's abandonment, which I
5 believe they say was communicated to them on April 16th,
6 2008.

7 Well, certainly at that point when Lehman picked
8 up the phone and frankly probably before, Lehman had not
9 continued to mutually consent to extension of the
10 exclusivity period, and therefore an extension of the
11 termination date.

12 And everyone agrees, I believe, that once the
13 termination date happened, the work plan expired. So the
14 termination provision also shows as a matter of law that
15 whether it's a Type 1, whether it's a Type 2, there's no
16 plausible allegation of a breach.

17 And then, Your Honor, I should also mention that
18 the plaintiffs didn't address with respect to the Type 1
19 analysis, I should've said this earlier, they didn't address
20 the New York State case law when obviously a disagreement
21 was governed by New York State law. And the New York State
22 cases say that where an agreement calls for the negotiation
23 and consummation of future agreements as a prerequisite to
24 performance, well, there is no agreement. And that's
25 exactly what was called for here, and they haven't addressed

1 that in their papers. So again, it's not a Type 1
2 agreement.

3 And then two more points, and then I'll sit down,
4 Your Honor. The -- on the loss profits, okay, the lost
5 profits are subject to New York law, as is everything
6 because of the work plan, and under New York law, you have
7 to show that the damages were caused by the breach. I won't
8 discuss it, because obviously we don't think there was a
9 breach.

10 Number two, you have to show that they're able to
11 be shown with reasonable certainty. Your Honor, I submit
12 that with the allegations of the complaint, what's attached
13 to the complaint, it is simply implausible, and there are no
14 facts alleged that could possibly lead, not only to the
15 plausibility, but even the potential that a new potential
16 joint venture where Lehman was going to buy on a nominal
17 basis half of the company for \$100,000 that somehow five
18 years later it -- that half share was going to be worth \$88
19 million and five years of profit, which I believe was
20 calculated at \$60 million.

21 It's also counter factual, because we're in kind
22 of a weird position, because a lot of these lost profit
23 cases you're trying to determine -- the Court is trying to
24 look a little bit in the -- where the history has happened,
25 and also out into the future.

1 Well, here we know exactly what happened. Their
2 business partner if this thing had gone through was us, I
3 mean, not us literally but LBI, and they went into
4 liquidation. And it was also on the cusp of the greatest
5 meltdown in financial global history.

6 And so I think as a matter of common sense, and
7 it's not plausible that these lost profits should be
8 allowed. And they're not, as a matter of law, by the way,
9 should the Court determine that it was a Type 2 agreement,
10 they're not available as a matter of law for such an
11 agreement.

12 And the final factor in the Kenfurt (ph) New York
13 law analysis, is whether they were in the contemplation of
14 the parties. There's nothing in the agreement that shows
15 that they were in the contemplation of the parties.

16 I know that the claimants have pointed to the
17 exclusivity provision that says there will be irreparable
18 harm, but I would submit it's an implausible reading to
19 think that that meant the parties thought if they breached
20 the exclusivity agreement, that they had to pay -- one or
21 the other had to pay upwards of \$150 million.

22 THE COURT: What about the removal of the header?

23 MR. BENTON: Yes. Well, Your Honor, certainly in
24 the Decold (ph) case, found that to be important. But it
25 was not the only thing that was important. It was only one

1 of many factors that Decold looked at. And I do think that
2 you can consider that. But I think importantly in our case,
3 and unlike the Decold case, we have an express provision,
4 it's not just that we -- that it doesn't say that it's
5 binding, which is true against us, okay, it only says it's
6 binding against them on the exclusivity provision.

7 Regardless of whatever the header that came off in
8 the course of negotiations, it can't trump the express
9 language of the agreement. And the express language of the
10 agreement says, it will not apply unless they enter into all
11 of the definitive agreements. There is an express provision
12 that says it won't be binding. It looked at -- the
13 agreement looked at itself in the mirror and said, this -- I
14 might never happen.

15 So I don't think Decold is relevant. It's
16 relevant but --

17 THE COURT: So and given the words of the
18 agreement then, it doesn't matter why Lehman didn't conclude
19 -- why the definitive documents weren't concluded. In other
20 words, if Lehman just changed its mind.

21 MR. BENTON: No, Your Honor, I don't -- I have
22 severed kind of levels I think to be answers to that. It
23 also depends I think on which type of agreement we're going
24 to assume that the --

25 THE COURT: Okay.

1 MR. BENTON: -- plan is. But as an initial
2 matter, the agreement doesn't contain any bonding language
3 by imposing any particular standard of negotiations, whether
4 it's good faith, heightened good faith --

5 THE COURT: But you -- but wait, good faith gets
6 implied.

7 MR. BENTON: Well, good faith gets implied if
8 there's good faith and fair dealing gets implied into a
9 contract, but we're here. We're here to decide --

10 THE COURT: Right. But if --

11 MR. BENTON: -- what the nature of the contract
12 is. And so, of course, if we decide that the contract is a
13 non-enforceable agreement to agree, we don't import a good
14 faith and fair dealing into it.

15 So it's an unusual, and it's kind of -- the state
16 of the law, and I'm sure Your Honor has looked at some or
17 all of the cases --

18 THE COURT: Uh-huh.

19 MR. BENTON: -- it can get a little wonky,
20 frankly, in terms of looking at these. But in truth, the
21 question is whether there's a contract. And if there's a
22 contract, what is the scope of that contract. And then, of
23 course, if there is a contract, there is a duty of good
24 faith and fair dealing, but it depends on the scope of the
25 contract.

1 And I would submit here, that the contract, the
2 work plan was a plan towards a potential strategic
3 transaction. It bound the Credencial parties to deal
4 exclusively for a period with us, which I don't think is
5 surprising in a commercial agreement where it's a very small
6 party, such as Minicreditos is going to deal with a -- at
7 the time, very large and successful global investment
8 company.

9 So I don't think that there is -- I think Lehman
10 could have decided not to continue with the transaction if
11 they had decided -- if they wanted to. And, in fact, the
12 approval rights, which are contained in the agreement, and
13 also by the way in the schedules to the work plan, the --
14 those provide that there's going to be board approval. And
15 they don't (indiscernible) in the board approval. And so
16 the board, you know, could disapprove.

17 Now, with that said, I don't disagree, and I'm
18 sure Mr. Sher is getting ready, that to the extent that a
19 contract is found to be a Type 2 agreement, that it is found
20 to be an agreement to negotiate in good faith towards a
21 goal, okay, the parties have to abide by the ability to --
22 the good faith obligation.

23 Now, that might or might not mean that there was
24 cabin (ph) on or some limits on the ability of the board
25 approval, although there are none contained in the

1 agreement, but it certainly would mean that there would be
2 some obligation to, as set forth in Teachers, and it's whole
3 progeny that there would be a necessity to negotiate in good
4 faith towards the transaction.

5 Although I will mention again that that's why if
6 you breach that, which I can say that we don't --

7 THE COURT: Right.

8 MR. BENTON: -- it doesn't mean that you get lost
9 profits, because you could have the best faith, you could
10 negotiate forever and not get anywhere.

11 THE COURT: So hypothetically, if it's a breach of
12 a Type 2, a breach of the obligations and negotiating in
13 good faith, what would the measure of damages be?

14 MR. BENTON: The possible measure of damages would
15 be the reliance damages, okay.

16 THE COURT: So out of pockets?

17 MR. BENTON: Yes, out of pocket damages, and which
18 that they've said, I mean, they've alleged, and I don't know
19 the exact number, if you could help me out, I think it's
20 somewhere around the region of 2 million or 3 million. I
21 don't know if they are including in that the value of the
22 shares that -- as part of the first, which they've got --

23 THE COURT: Right.

24 MR. BENTON: -- about 8 million I think now, I
25 would say that that's not part of the reliance damages or

1 shouldn't be because those shares weren't pledged to us as
2 they freely admit. And there's no allegation and no
3 evidence that they ever paid the loan back. And I don't
4 necessarily agree that the amount that they put for the
5 reliance, I think they would be entitled to reliance
6 damages.

7 THE COURT: All right. Thank you.

8 MR. BENTON: Sure. Oh, and if I could mention one
9 more thing, Your Honor --

10 THE COURT: Sure.

11 MR. BENTON: -- just so I didn't forget,
12 apologies.

13 The parties -- we had objected to post-petition
14 interest, they didn't respond, so I just wanted to put that
15 out there as we're going forward, that's an independent
16 reason I think for that to be --

17 THE COURT: But I kind of put the post-petition
18 interest in the same category as the secured claim.

19 MR. BENTON: Okay. Thank you, Your Honor.

20 THE COURT: Okay. Thank you.

21 MR. SHER: Good morning, Your Honor.

22 THE COURT: So you could start from where we just
23 left off with respect to the measure of damages.

24 MR. SHER: Absolutely, Your Honor.

25 THE COURT: Tell me your theory as to why, you

1 know, even if you're right, you should get so many millions
2 of dollars.

3 MR. SHER: Absolutely. If I may, for the record,
4 it's Justin Sher from the law firm of Sher Tremonte on
5 behalf of the claimants, Credencial, Minicreditos and Carlos
6 Gorleri, who's here with us today. And I'm joined with my
7 associate, Mark Cooper at counsel table.

8 With respect to the damages, whether it's a Type 1
9 or Type 2 agreements, we are entitled to our direct
10 expectation damages. And even if you don't describe them as
11 expectation damages, direct consequential damages, and I'm
12 concerned by the characterization of lost profits that the
13 trustee has used in their brief, and to the extent, we
14 adapted, we should not have, because that's not an accurate
15 description of what happened here.

16 Minicreditos was an existing company that was
17 doing very well. It served the lower and middle income
18 communities, provided credit to those populations and as a
19 growing credit company, it required capital to continue to
20 grow. And it had several options of potential institutions
21 from which to get that capital. It ultimately chose Lehman
22 Brothers to do so.

23 The notion that it was not contemplated, that if
24 Lehman Brothers pulled out of their deal, and decided not to
25 support the 50 million Argentine pesos capital structure,

1 that it would be a surprise to everyone that this credit
2 company could not continue to exist, that's just in my mind
3 untenable.

4 Clearly, if the capital is not there, a credit
5 company will be decimated, and that's exactly what happened.
6 So the notion that this is some speculative application for
7 lost profits, that's incorrect.

8 What happened as a result of LBI's breach, and we
9 submit it was a breach of a binding agreement, what happened
10 as a result of that breach is a company was decimated and
11 ceased operations.

12 And the way to value a company is you look at
13 projections. And in this case, those projections were the
14 result of collaboration with LBI during a due diligence
15 period that preceded the work plan.

16 And to put this into context, Your Honor, there
17 was a non-binding agreement to negotiate, and that was the
18 letter of intent that was signed in August of 2007. And in
19 that case, LBI and my clients agreed on a provision that
20 specifically said non-binding agreement. And in the text of
21 that letter of intent, they described it as an
22 understanding, not as an agreement.

23 In contrast, the work plan, that paragraph,
24 paragraph 10 of the letter of intent is nowhere in there.
25 There's nothing that says this is a non-binding agreement.

1 And in the merger clause that appears at the end, it says,
2 this agreement and understanding and the terms of this work
3 plan shall be in place, and shall apply unless and until the
4 transactional documents are executed.

5 And one of those transactions -- oh, go ahead.

6 THE COURT: But then you have the termination
7 provisions that go into effect.

8 MR. SHER: That's correct, and I'd be happy to
9 address that.

10 So as I understand the trustee's argument, they
11 claim that the reason it's not binding is because it had
12 this condition that these documents had to be executed by
13 this termination date.

14 And just to diverge for a second, they refer to
15 New York law, and suggest we haven't responded to it, what
16 -- as Mr. Benton correctly stated it, what New York law says
17 is, and I don't think that they've -- the New York Court of
18 Appeals actually clearly said, they still agree with the
19 reasoning of Teachers versus Tribune, which is the seminal
20 case, and hopefully I'll have a chance to explain later how
21 closely that case is in terms of facts to this one.

22 But what that New York Court of Appeals case says
23 is IDI, is that where the execution of final formal
24 documents is a precondition of performance, there may not be
25 a binding agreement. And, in fact, in that case, they found

1 that it wasn't a binding agreement in the IDI case in the
2 New York Court of Appeals.

3 Here, here there's no question that the execution
4 of those transaction documents was not a precondition of
5 performance. How do we know that? Because Credencial
6 performed under the work plan. They did the Minicreditos --
7 they spent millions of dollars on the Minicreditos clean-up
8 at LBI's direction, they pledged 20 percent of their shares
9 to LBI, and they executed the Credencial loan documents.

10 So one of the transactional documents was, in
11 fact, executed, that's the Credencial loan. And they --
12 yeah.

13 THE COURT: But so they did those things --

14 MR. SHER: Uh-huh.

15 THE COURT: -- but they didn't do everything.

16 MR. SHER: Credencial as far -- I don't think
17 there's -- believe there's any suggestion that my clients
18 didn't perform completely under the work plan.

19 THE COURT: I'm sorry, I stated that incorrectly.
20 So certain things happened, but not everything happened --

21 MR. SHER: Correct.

22 THE COURT: -- that needed to happen before there
23 was no doubt that there was a binding agreement. So certain
24 things didn't happen and then there was a termination,
25 right?

1 MR. SHER: Well, I disagree slightly with the
2 characterization. So there's no question that the one thing
3 that didn't happen certainly, although the draft agreements
4 were prepared, that they weren't executed.

5 THE COURT: Right.

6 MR. SHER: For whatever reason they weren't
7 executed. That's for sure and Lehman Brothers, LBI didn't
8 provide financing that they said they would provide.

9 THE COURT: Right.

10 MR. SHER: And what the IDI case says is, and we
11 agree with it, is that we're not suggesting that in every
12 case where there's a preliminary agreement that contemplates
13 some further documentation down the road, that if it doesn't
14 go to fruition, there's a breach, and we're entitled to
15 damages. That's not our position.

16 As the IDI case in the New York Court of Appeals
17 observed, if there's a good faith impasse over the
18 negotiation of those agreements, then there is no breach.
19 There's no breach of the duty of good faith and fair dealing
20 if that's what happens. Here there is no suggestion that
21 there was a good faith impasse over those -- that
22 documentation.

23 All that happened, as the Court observed, is LBI
24 changed its mind, you know, whether it was because of the
25 financial situation or their lack -- their decision they

1 were no longer interested in investing in the South American
2 consumer credit companies, whatever it was, they decided
3 after a period, you know what, we change our mind, we don't
4 want to do this deal.

5 As the Teachers case, Teachers versus Tribune
6 Company case says, you cannot do that. And that case was
7 almost the exact same thing facts as this case. It involved
8 a loan agreement. The only difference was, the Court
9 enforced that agreement against the borrower. The borrower
10 tried to get out of the preliminary loan agreement, because
11 what happened in the three months that they were supposed to
12 be negotiating their final agreements is interest rates
13 dropped. And the bar said, you know what, I don't want this
14 deal anymore, I can get capital for less. And the Court
15 said, no, you cannot do that.

16 And that's exactly what Lehman Brothers is trying
17 to do here. And if an agreement like that is enforced
18 against the borrower, it has to also be enforced against the
19 lender. So I want to make sure I answered the Court's
20 question.

21 THE COURT: So you say it's -- you believe this is
22 Type 1.

23 MR. SHER: Absolutely. But even if it's Type 2,
24 we are entitled to all the damages we claim, a company was
25 decimated. Just like in -- and again, the Teacher's case,

1 the Court found in favor of the plaintiff on its full
2 judgment. It's exactly the same circumstances here.

3 The one other thing I wanted to point out is, what
4 LBI is suggesting is that the reason this work plan was not
5 a binding agreement, despite all the indications that the
6 parties intended to be bound by it, it's a 28-paged
7 document, signed by sophisticated parties, they took out all
8 this language that suggests it's not binding, but what LBI's
9 argument, as I understand it is, is that because there was a
10 condition in there that something, some final thing had to
11 happen before the parties proceeded to perform the
12 agreement, that is that the execution of the transactional
13 documents, and the approval of the board.

14 And again, on approval of the board, I go back to
15 the Teachers versus Tribune case, the borrower used the
16 exact same excuse as to why they didn't want -- why the
17 condition was not met under their preliminary agreement.
18 They said, our board never approved it, I'm sorry, it
19 expired as of the end of the year, we're off the hook. The
20 Court said no, no, no, you can't do that. That's a breach
21 of good faith and fair dealing.

22 But what LBI's position seems to be is that
23 whenever there is a condition in one of these agreement,
24 that it therefore is not binding. And that's not true.
25 Because binding agreements all -- very often contain some

1 sort of condition. And for that principle referred to in a
2 Second Circuit case we cited in our papers, but we didn't
3 discuss at length, and that's Indian.com versus Delahl (ph)
4 and it's 412 F.3d 315. And in that case, it was an
5 agreement to pay commission -- a company agreed to pay a
6 commission to a former employee who was asked to broker a
7 sale of one of its subsidiaries. And if the deal closed,
8 only if the deal closed would the individual receive a
9 commission.

10 And what happened was, the individual did all the
11 work, brought the parties together, the sale was about to
12 happen, and for whatever reason, the company changed its
13 mind and said, I don't want to do this deal, I don't want to
14 pay your commission, deal doesn't close.

15 And in that case, the Second Circuit says, no, no,
16 you can't do that. If there's a condition in the contract
17 that -- and you cause it --

18 THE COURT: You caused the failure.

19 MR. SHER: Exactly. And that's exactly what
20 happened here, it's exactly what happened in Teachers versus
21 Tribune, and that's a breach of the good faith and fair
22 dealing -- implied covenant of good faith and fair dealing.

23 And interestingly, in India.com the Second Circuit
24 observed, that you don't even have to show bad faith in
25 those situations. If you show that it was an arbitrary

1 decision, that that's a wrongful termination of the
2 agreement. And in that situation, the broker got all of his
3 damages, the entire commission that he would've been
4 entitled to if the deal had closed. And that's simply what
5 we're asking for.

6 THE COURT: But now, and I'm going to skip topics
7 a little bit, but that type of damage calculation is very
8 different from the type of damage calculation that you've
9 put in. So I thought counsel answered commendably and
10 honestly with respect to the -- you know, the reliance
11 damages, but there's a huge gap between that and, you know,
12 hey, the world would've been our oyster, and you owe us \$100
13 million. I mean, that's a big, big gap.

14 MR. SHER: There's no question it's more
15 complicated than calculating a commission based on a sale
16 price, I completely agree, Your Honor. But again, I don't
17 think it's fair to suggest that we are seeking extraordinary
18 speculative lost profits. And I think by the way, it's
19 equally speculative to suggest that because of the recession
20 that Minicreditos could not have continued to make money in
21 South America serving the middle -- lower and middle
22 communities there.

23 And we're not pulling these numbers out of thin
24 air. These are numbers that were a result of collaboration
25 with LBI in advance in the due diligence period --

1 THE COURT: Right, but in a period of time before
2 the world fundamentally changed.

3 MR. SHER: No question, no question. But the
4 company, you know, this is again a credit company. It's not
5 -- all the parties understood that if a credit company
6 doesn't have access to capital, it goes away. So all we're
7 trying to do is, yes, out of pocket expenses, which as Mr.
8 Benton indicated it approached 10 million, but also the
9 decimation of a company that already existed. This was not
10 a new company, it's not a new venture, it existed and it was
11 successful. They needed capital to grow. And that's all
12 we're seeking compensation for.

13 THE COURT: Okay. Thank you.

14 MR. SHER: Thank you, Your Honor.

15 MR. BENTON: Your Honor, just a few comments. On
16 Teachers, I think there was some more smushing going on to a
17 certain degree, and I'll try not to do it, a fourth time
18 will not be the trick I think.

19 THE COURT: Okay.

20 MR. BENTON: You know, first of all, Teachers is a
21 type -- is a case where a Type 2 agreement was found in that
22 case, not a Type 1. And I think in the brief, and also in
23 some of the comments, and it's also somewhat natural, I do
24 it when I talk about the cases, sometimes it's difficult to
25 keep the principles or the cases clear when we're talking

1 about what actually the Court held.

2 But they -- to be clear, it was a Type 2, not a
3 Type 1. And so Type 1, the Teachers case does not stand for
4 any proposition that -- for a Type 2 you can get lost
5 profits.

6 And I know that Mr. Sher repeatedly said that they
7 can get lost profits for a Type 2 agreement, but in fact,
8 the case law says you can't. And we've cited it all, but
9 there are cases from Adjust Right (ph) in the Second Circuit
10 to the Gory Densky (ph) and Goodstein (ph) cases in New
11 York. I mean, and also basically it's a matter of logic and
12 common sense. Because otherwise, you'd just simply be
13 transforming an agreement to negotiate in good faith to the
14 agreement to consummate the ultimate transaction. They
15 would again be smushed. I'll go one more time.

16 And so that's not the law. And also when Mr. Sher
17 says that we're on all fours, when we're on all fours with
18 Teachers that's also not the case. There are fundamental
19 differences. I mean, it is a deciminal case, in fact, it
20 came up with the whole Type 1, Type 2 evaluation. Which I
21 don't disagree, there is a bit of confusion between the New
22 York State cases and the federal cases as to whether we're
23 going to use this nomenclature, as to whether we're not.

24 But at the end of the day, the reason we included
25 both is because I just don't think it matters. I think the

1 language matters and the intent matters. And so I don't
2 disagree that we should be also citing the federal cases and
3 using them, because I think it's not always useful, but it
4 can be useful.

5 But Teachers --

6 THE COURT: So in your view of the world though,
7 you know, you're getting down to the deadline, lawyers have
8 been working hard, you're in the closing room, agreements
9 are on the table --

10 MR. BENTON: Uh-huh.

11 THE COURT: -- and you just decide not to sign.
12 So in your formulation --

13 MR. BENTON: Uh-huh.

14 THE COURT: -- no consequence to that.

15 MR. BENTON: Yes, unless it's -- I mean, if it's a
16 Type 2 -- if it is found to be a Type 2, then there could
17 well be a consequence to that. If there is not a Type 2,
18 which is -- you know, the presumption for both Type 1 and
19 Type 2 under the law, as stated even in Teachers is against
20 finding binding obligations and agreements unless the
21 parties clearly intended to be bound.

22 So it's not that there are two types of
23 preliminary agreements, Your Honor, there are three types of
24 preliminary agreements. One is called an unenforceable
25 agreement to agree, that's neither a Type 1 nor a Type 2.

1 THE COURT: Right.

2 MR. BENTON: And with respect to Teachers,
3 fundamental differences apply even with our case and theirs.
4 It was Judge Gerber in Lyondell said, as many cases have
5 said, it's fundamentally important that Teachers actually
6 said that it was binding. We don't have that here.

7 And not only that, Teachers did not have, to my
8 memory, they did not have anything like our termination
9 provision. Also, with respect and I will try to be quick on
10 New York law.

11 I think it's the IDT case, but maybe I keep
12 looking at the T and it's in I's, so it's either IDT case or
13 IDI. It's the case that said, as Mr. Sher stated, the New
14 York case that stated, you know, we don't necessarily agree
15 with the reasoning of the federal court cases, but we agree
16 with their logic, but where the negotiation of further
17 agreements is a prerequisite to a party's performance, you
18 know, there is no agreement.

19 It is absolutely true, as we pointed out in our
20 opening brief, that the IDT case itself is not kind of
21 directly relevant to our argument on the Type 1. It's the
22 progenitor of later cases on the enforceability of
23 agreements, rather than the -- a condition to the
24 performance of an agreement.

25 The IDT case did involve a settlement agreement,

1 but the Court said, this is a binding settlement agreement.
2 And then the parties had to go on and negotiate further per
3 their agreements. And in that case, there was a
4 precondition to performance under an agreement the Court had
5 already determined.

6 But there's a difference as the Court itself in
7 IDT pointed out between conditions to performance of an
8 agreement that's an agreement, and looking to conditions
9 like we have here to determine is there an agreement at all.
10 And cases like Amcan and Lyondell have gone on and used the
11 IDT case to find no enforceable agreements.

12 With respect to the new entity, it -- as I believe
13 that Minicreditos was formed in 2006, there are cases such
14 as -- I believe Seanfeld (ph) and in any event, Logic, this
15 was a new company by very virtue of the fact that it was
16 going to be a joint venture that as their papers say, was
17 intended to compete with the -- they didn't say it this way,
18 but the big boys, with bigger -- with some of the bigger
19 competitors. So I do think it was an unknown new joint
20 venture.

21 And I guess I think that's it. I thought it was
22 interesting, Your Honor, though when Mr. Sher said that it
23 was equally speculative what would happen if -- maybe the
24 credits -- maybe the damages would've been more. But I just
25 think that really points to why this is -- they are

1 speculative.

2 Who knows, I don't know, and they don't know
3 either, and they haven't alleged why they know.

4 THE COURT: Right. But that's not something that
5 I can figure out at this -- whatever would be appropriate
6 for me to figure out at this stage. I do make the
7 observation that it's a -- that's a tricky -- that would be
8 a tricky phase of the trial to, I think, to make that
9 determination of those damages. As you said, you know,
10 you're looking in a crystal ball in a rearview mirror.

11 MR. BENTON: I like that one.

12 THE COURT: You like that one?

13 MR. BENTON: I'm really upset I didn't put that
14 down.

15 THE COURT: I just made that up.

16 MR. BENTON: That was really good. I appreciate
17 the -- but I do think there are cases --

18 THE COURT: Look --

19 MR. BENTON: -- on motion to dismiss on lost
20 profit damages, and in particular, it's not just the -- just
21 to be clear, it's not just whether they're speculative or
22 they could be proven to reasonable certainty. It is also
23 whether they were in the contemplation of the parties. And
24 I think that --

25 THE COURT: Right. No, the contemplation of the

1 parties is definitely a big point. Look, I find this very
2 fascinating and very difficult, and I -- frankly, I don't
3 feel comfortable sustaining the objection at this juncture.
4 That doesn't mean that victory is in hand, but I don't -- I
5 do not feel that there is a basis, despite the very
6 compelling arguments in your papers frankly to sustain the
7 objection at this 12(b)(6)-like phase.

8 So I think you ought to go into the next phase
9 consistent with the ADR procedures, you know, discovery,
10 briefing, what have you and let's keep going for a bit.

11 MR. BENTON: Yeah, and that is not -- obviously
12 not a problem, Your Honor.

13 THE COURT: Okay.

14 MR. BENTON: Since -- but I would --

15 THE COURT: I mean, to the extent that you're
16 reading, you know, the tea leaves that I'm pointing out, I
17 mean, I do -- I'm very troubled by the damage calculation,
18 but I'm also very interested and putting aside Type 1, Type
19 2 agreements, you know, however you want to bucket all of
20 this, there are aspects of the way this played out that I
21 think taken outside the realm of something that can be
22 purely decided on papers.

23 There was conduct, there was stuff going on that
24 informs this entire situation. I just put out a rather
25 lengthy decision in another case that talks about, yes, you

1 have to read the words, and the words can appear to be clear
2 and unambiguous, but you do also have to consider the
3 context.

4 So I'm feeling a little bit of a need, and you're
5 free to -- it's without prejudice to your rights to convince
6 me otherwise, if we would ever get to a summary judgment
7 phase to not look --

8 MR. BENTON: Oh, I'm going to try certainly.

9 THE COURT: So look at the context, but maybe
10 somewhere along the line in the ADR procedures, you'll find
11 another path to resolve this, but in any event.

12 MR. BENTON: Well, I appreciate it, Your Honor.
13 And like I said, you know, in terms of ADR and the ADR
14 procedures don't prevent us from talking outside the ADR
15 procedures.

16 THE COURT: Right.

17 MR. BENTON: And we actually do. Despite my
18 disagreement with their --

19 THE COURT: With virtually everything he said.

20 MR. BENTON: With virtually -- not virtually, it's
21 actually absolutely everything, no, but I mean, we do have a
22 good relationship --

23 THE COURT: Okay.

24 MR. BENTON: -- and so I'm sure that we can at
25 least have a good talk.

1 THE COURT: Okay. So if you would be so kind as
2 to draft up an order and share it, and send me in order to
3 just disposing of what we had --

4 MR. BENTON: Okay.

5 THE COURT: -- today and indicating what's going
6 to happen in the future.

7 MR. BENTON: Yes, that's not a problem, Your
8 Honor, thank you.

9 THE COURT: All right. Thank you very much.

10 MR. SHER: Thank you, Your Honor.

11 THE COURT: Have a good day. I think that's it
12 for this morning. So we will -- yes?

13 UNIDENTIFIED: Can I address (indiscernible) in
14 our motion, Your Honor? Not this motion but LBHI, we're
15 waiting on the (indiscernible).

16 THE COURT: Right. And?

17 UNIDENTIFIED: We did get it.

18 THE COURT: Okay.

19 UNIDENTIFIED: So what we'll do, Your Honor, we'll
20 spin the order, you know, carve it out all the parties who
21 appeared and we'll (indiscernible) --

22 THE COURT: Great, terrific. All right. Thank
23 you very much. All right. We're going to resume with the
24 rest of the calendar at 1:30 today. Thank you, folks, very
25 much.

1 (Recessed at 12:03 p.m.; reconvened at 1:41 p.m.)

2 THE COURT: All right. Who would like to start?

3 MR. MILLER: Good afternoon, Your Honor. May it
4 please the Court I'm Ralph Miller with the Weil firm here on
5 behalf of the plan administrator, Lehman Brothers Holdings,
6 Inc. or LBHI.

7 Your Honor, the first item on the afternoon agenda
8 will be two specific claims filed by Ms. Heidi Steiger and
9 by a limited partnership she controls, Steiger & Associates.
10 These claims Numbers 32379 and 32380 were objected to in the
11 two-hundred-fifty-fourth omnibus objection. I think if I
12 might very briefly, Your Honor, I would like to explain why
13 the application of Section 510(b) to these claims is simple
14 and straightforward because the claims themselves contain
15 admissions that make the statute directly applicable to the
16 --

17 THE COURT: So let me ask you a question, Mr.
18 Miller? We spent a lot of quality time together during the
19 three-day trial we had relating to the RSUs and that
20 included some other claims by the Neuberger Berman folks.

21 So these securities if you will, these are not
22 RSUs. This is stock.

23 MR. MILLER: That's correct, Your Honor. This was
24 Neuberger Berman stock originally that Ms. Steiger had --

25 THE COURT: Right.

1 MR. MILLER: -- which were converted in 2004 at
2 the time of the merger. Actually, it was an acquisition and
3 they were converted to Lehman Brothers Holdings Inc. common
4 stock.

5 THE COURT: Okay. So the -- at the first level,
6 stock is stock.

7 MR. MILLER: That's correct, Your Honor.

8 THE COURT: And the objection seems to want me to
9 say stock is not stock here.

10 MR. MILLER: Well, I think that's right, Your
11 Honor. Happily, the claim itself however makes it clear
12 that all the damages arise from the conversion of one stock
13 to another stock, and that's why we think this is something
14 that, really, on its face is in the core of Section 510(b).

15 THE COURT: Okay. Why don't I let you continue?

16 MR. MILLER: Well, Your Honor, what I would like
17 to do just very briefly is I'll point out the three sort of
18 sentences in the statute that I think are the key, and then
19 I would like to pass out the claim and show how the
20 admissions in the claim make those --

21 THE COURT: Okay.

22 MR. MILLER: -- three sentences apply.

23 As the Court's well aware, the first operative
24 statutory definition is 11 U.S.C. Section 101.16 which
25 states the term equity security means "a share in a

1 corporation whether or not transferrable or denominated
2 stock or a similar security." That's important because they
3 make some emphasis on the fact that there were some transfer
4 restrictions.

5 The next two phrases are in 510(b) which requires
6 subordination for "a claim arising from rescission of a
7 purchase or sale of a security of the debtor or of an
8 affiliate of the debtor." And also requires subordination
9 of a claim "for damages arising from the purchase or sale of
10 such security."

11 Now if I may approach, Your Honor --

12 THE COURT: Sure.

13 MR. MILLER: -- I have --

14 (Pause)

15 MR. MILLER: Your Honor, what I did was to pass
16 out briefly the declaration of Mr. Donald A. Watnick and I
17 have -- we flagged really only two pages in each of the
18 claims themselves that have, we believe, key admissions.
19 The first highlight is on page one. "Steiger" -- that's
20 referring to Heidi Steiger -- "a senior executive for
21 Neuberger Berman, Inc. at the time of its acquisition by
22 Lehman in or about October of 2003."

23 Then skipping a sentence, "as a part of her
24 compensation from Neuberger, Steiger received valuable
25 shares of stock in Neuberger." Skipping another couple of

1 sentences, and this is really the one that sort of ties this
2 up, "At the time of Lehman's acquisition of Neuberger,
3 Steiger agreed that her stock holdings in Neuberger would be
4 converted to shares of Lehman stock and would be subject to
5 certain restrictions, including (i) that she and any entity
6 she was affiliated with, such as Steiger & Associates, could
7 sell only ten percent of her Lehman shares per year and (ii)
8 that if she engaged in certain competitive activities with
9 Lehman she and affiliated entities would essentially forfeit
10 all shares of Lehman stock."

11 Then we skip over to the next page. The first
12 paragraph there is talking about how the stock went down in
13 value and how she says she didn't pursue valuable
14 opportunities that could have made her \$10 million a year.
15 There's no proof of any of that, Your Honor, but it's not
16 really relevant.

17 But the highlighted language on the second page
18 is:

19 "In view of the foregoing, Steiger is entitled to
20 recover damages equal to the value of the consideration that
21 Lehman agreed to provide to her in exchange for her
22 agreements to restrict her sales of Lehman stock and to not
23 engage in competitive activities for three years without
24 Lehman's prior consent and lost earnings. These damages
25 should be award based on causes of action for breach of

1 contract, rescission, unjust enrichment and as a matter of
2 equity, these damages are equal to between \$16,800,000 (the
3 value of her Lehman stock holdings when her Lehman
4 employment terminated) less the value of any shares of
5 Lehman stock sold by claimant thereafter and \$30 million,
6 her lost earnings for the three year non-compete period, and
7 will be proven in an appropriate hearing."

8 Now what is key to all of this is it makes it
9 clear that all this ties back to the stock.

10 The second tab is on the Steiger Associates proof
11 of claim and really the first sentence has everything that
12 is necessary to apply 510(b). It says, "The basis for the
13 proof of claim of Steiger Associates, L.P., Steiger
14 Associates, a claimant, is stock it owned in Lehman Brother
15 Holding, Inc." That says it all.

16 Now, Your Honor, we think that the statute just
17 clearly applies. I do want to deal with a couple of sort of
18 loose ends and in response because they, of course, try to
19 make some distinction.

20 The argument in the response is that "stock
21 holdings in debtors did not arise from voluntary purchases
22 and did not arise out of compensation received from a non-
23 debtor Lehman entity."

24 Now the first part of that about voluntary
25 purchases is something that the Court has dealt with and, as

1 you know, the Enron opinion at 341 B.R. 141 is one of a
2 number that have held that it's not involuntary because it's
3 part of a compensation arrangement and merger transaction
4 and other things. There are groups of cases of that sort
5 cited in our reply.

6 This reference to compensation received from a
7 non-debtor Lehman entity really has nothing to do with
8 anything. That's saying she worked at Neuberger. She got
9 Neuberger stock. It's the conversion that's the purchase,
10 Your Honor.

11 Now I don't think any case law is really needed,
12 but if you did need a case, the In re: Paragren (ph)
13 Systems, Inc. case, which is cited on page 3, is really
14 right on point. There, the claimant had been a shareholder
15 in a company that was acquired prepetition by the debtor.
16 As a part of the merger the claimant exchanged his stock --
17 her stock of the debtor. There were employment agreements
18 and non-competes, and the claimant filed a proof for damages
19 based on the non-competition agreement. There, Judge
20 Fitzgerald found the "non-competition agreement was entered
21 into as part and parcel of the merger and for no other
22 purpose or consideration."

23 That's essentially what these -- what the claim
24 says. It says, and it's notable by the way that the penalty
25 for the non-competition was forfeiture of the stock. I

1 mean, there's no other penalty alleged. By the way, they
2 did not introduce in this record a copy of the agreement.

3 If Ms. Steiger wanted to argue that her conversion
4 was involuntary she -- or somehow coerced or anything else,
5 she filed a declaration. There's nothing about that in the
6 declaration. There's nothing in the record. She's the sole
7 source of any argument for that. They've had an
8 opportunity. Nothing has been put in.

9 And, finally, with regard to these breach of
10 contract claims, Your Honor, there is -- first of all, there
11 is no identification that there was any alleged contract
12 that was breached, and there is no statement of the way in
13 which the breach occurred. Although it says a reference to
14 unjust enrichment, there is no recitation elements or any
15 allegation of facts to go with the elements. If this were a
16 motion to dismiss, this would be dismissed for failure to
17 state a claim.

18 As Judge Fitzgerald noted in the Paragren case,
19 "Subordination cannot be defeated merely by attempting to
20 classify a claim as a breach of contract rather than a
21 breach incident to a stock purchase or sale agreement." And
22 that's essentially what we have here.

23 In short, Your Honor, all the claims asserted in
24 Claim Numbers 32379 and 32380 are arising from rescission of
25 the purchase of LBHI common stock because they do refer to

1 rescission or damages arising from the purchase of such a
2 security, and that's the conversion. The claimants have had
3 ample opportunity to offer any facts through their
4 declarations that would put in issue the causal connection
5 to the conversion. They've not done so. And there's not a
6 shred of evidence to support any of the allegations about
7 involuntary purchase or breach of contract that could avoid
8 the language in 510(b).

9 So the plan administrator requests that the
10 objections be granted. The full value of the claims would
11 be converted to equity interest. We're not quibbling over
12 the \$33 million. And that's the relief that we seek, Your
13 Honor. I would be happy to take any questions.

14 THE COURT: All right. Thank you.

15 Good afternoon.

16 MR. WATNICK: Good afternoon, Your Honor. Donald
17 Watnick. I represent the claimants, Heidi Steiger and
18 Steiger Associates.

19 THE COURT: So, Mr. Watnick, let me ask you. Ms.
20 Steiger left Lehman's employ in February of 2004?

21 MR. WATNICK: I don't believe she ever was an
22 employee of Lehman. She was an employee of Neuberger. She
23 had been part of Neuberger at the time of the acquisition.

24 THE COURT: Then -- but it says in your affidavit
25 that Steiger's employment with Lehman was voluntarily

1 terminated.

2 MR. WATNICK: Okay. Yes. I'm --

3 THE COURT: Okay. So Lehman was acquired by
4 Neuberger -- Neuberger was acquired by Lehman in October of
5 2003, right? I mean, that was the deal.

6 MR. WATNICK: Yes.

7 THE COURT: All the Neuberger people got to go to
8 Lehman, although I understand they actually never left the
9 Neuberger building.

10 MR. WATNICK: Correct.

11 THE COURT: Right. But they -- the Neuberger
12 people then became Lehman employees, right?

13 MR. WATNICK: I -- Your Honor, I don't recall that
14 as I stand here. I do have some recollection,
15 notwithstanding what I said in my affidavit, that I -- I'm
16 not sure if she ever became a Lehman person. I -- I have
17 some recollection that she may always have been a Neuberger
18 person. I certainly can check that, but I -- there's no
19 question that she was part of Neuberger and Neuberger was
20 acquired by Lehman, and that she left on the dates that you
21 mentioned.

22 THE COURT: Okay. I'm just -- Ms. Steiger was
23 part of a leadership team. She was a senior executive with
24 Neuberger Berman. She was one of the architects or lead
25 participants, if you will, on the Neuberger side of the

1 Neuberger Lehman marriage, right?

2 MR. WATNICK: She certainly was a partner at
3 Neuberger. She certainly was a senior person at Neuberger.
4 I'm not sure if there's anything in the record that says she
5 was an architect of the acquisition. She certainly did not
6 have the power to approve or disapprove it, and we submit
7 that there were others who made the decision. I believe we
8 -- the record shows that there was an agreement that
9 prevented her from objecting to the merger, but in any
10 event, she didn't have enough shares to tip the scales as to
11 whether this was going to be approved or not. And that's
12 really the basis of our position here, Your Honor; that this
13 was not a voluntary --

14 THE COURT: Yeah. But the problem is that it was
15 voluntary because she did not have to -- she -- if she
16 wanted to go out and do what she wanted to do for three
17 years, she could have done it. That was a decision. She
18 chose not to make that decision. She chose to take this
19 stock which, if the world had turned a different way, would
20 have made her very wealthy or wealthier than she might have
21 already been at that point. But that's not what happened.
22 So now she's unhappy.

23 And I -- I understand the RSU proceeding is
24 separate and not part of this record, but that's largely the
25 complaint of the Neuberger folks who got stock in RSUs.

1 They were perfectly happy when -- you know, when the world
2 was going like this, but then were unhappy after that.

3 And, I mean, reading the words of your declaration
4 it fits, as Mr. Miller pointed out, it fits squarely within
5 the statute. This is exactly what you're not allowed to do.
6 You're not allowed to take a claim that's based on stock --
7 this is clearly stock. It's not even an RSU. It's actual
8 stock -- and say, I don't like what it's worth now, so turn
9 it into something else. And that -- you're not allowed to
10 do that. That's what 510(b) prohibits you from doing.

11 Mr. Miller actually invited me down this path, and
12 I'll go down there, which is that even if I was inclined to
13 pursue the path that this was not covered by 510(b) -- and
14 I'll let you be heard -- I think that there's a good failure
15 to state a claim here full stop. When I read these papers,
16 I don't even see the claim. I don't see a claim. She had
17 this stock, unclear she sold whatever she could sell or not,
18 and then the notion that Lehman somehow should pay her \$30
19 million because she elected to abide by a non-compete, it's
20 just an extraordinary claim. It's not -- but it's not -- as
21 Mr. Miller pointed out, it's not based on anything. It -- I
22 mean, on a 12(b)(6) level there's no claim.

23 So you've got to -- I'm not getting there at all
24 based on what your papers have. So if you have anything
25 else, I would be delighted to hear it.

1 MR. WATNICK: Your Honor, I hear your points. I
2 hear Mr. Miller's points. I know that the Court has covered
3 many of these points in the RSU matter which --

4 THE COURT: No. But to be clear, I'm basing the
5 disposition of this motion on this record. But I -- of
6 course, I can't turn my brain off to what I heard in the RSU
7 --

8 MR. WATNICK: I understand.

9 THE COURT: -- trial. So --

10 MR. WATNICK: With respect to the point of claims,
11 I think the claims are pretty simple and straightforward,
12 and I think they are clear from the four corners of this
13 matter; that is, that there was an agreement that she wasn't
14 going to compete. If she abided by that agreement, she was
15 entitled to certain considerations. She didn't get.
16 Whether you look at it from a breach of contract standpoint
17 or an unjust enrichment standpoint --

18 THE COURT: What -- she was entitled to what if
19 she didn't compete?

20 MR. WATNICK: She was entitled to the value of
21 certain amounts. She was entitled to be able to have the
22 value of the Neuberger stock that she had at the time of
23 this acquisition. So that, we submit, is the basis --

24 THE COURT: Well, let me give you a hypothetical.
25 Suppose -- and everybody, I think, of a certain age

1 remembers what it was like the weekend leading into
2 September 15th, 2008. I certainly remember. And everybody
3 was thinking, is Lehman going to file; oh, my God, it's
4 never going to happen that Lehman's going to file. What if,
5 at the eleventh hour, there had been a rescue and low and
6 behold Lehman didn't file, but the stock was worth a penny.
7 Is the argument then she gets the difference between what
8 she felt it should have been worth or what it was worth at
9 its peak and a penny? Surely not.

10 The only reason that you're here making this
11 argument is because there was a bankruptcy and the stock was
12 rendered valueless. And, by the way, bankruptcy doesn't
13 always render stock valueless. You know, the folks who have
14 American Airlines stock are pretty happy these days. And
15 Lehman's perfectly happy to have her have an allowed amount
16 of an equity interest with everybody else who has equity.

17 So just her articulation right now of how she's
18 been wronged doesn't help me. It doesn't help me. The fact
19 that she did what she was supposed to do and through no
20 fault of hers the stock became valueless, that's the risk
21 that you undertake when you take stock.

22 MR. WATNICK: I understand the position there,
23 Your Honor. Our position is that there is a claim and our
24 position is what's distinct here as we've said in our papers
25 and as others have said in papers filed with this Court is

1 these weren't voluntarily -- voluntary purchases. These
2 were purchases that my client did not voluntarily undertake,
3 whereas in the same way that the cases say where someone
4 actually went out and bought the stock -- even in the
5 Paragren case, that involved, I believe, the sole owner of a
6 company who was -- you know, there's no question was
7 actively and voluntarily participating in the stock
8 transfer.

9 We submit that is not this case. We submit that
10 the authority -- the Paragren case and others all involve
11 voluntary purchases of stock whereas in this circumstance it
12 wasn't. We submit that that's why this is distinct.

13 THE COURT: And you say the damages are equal to
14 between \$16,800, the value of her Lehman stock holdings when
15 her Lehman employment terminated. So that was in February
16 of 2004. What happened after that? Did she sell her ten
17 percent a year?

18 MR. WATNICK: She did sell stock in the interim.
19 I don't -- as I stand here, I'm not sure what percentage --

20 THE COURT: Because it probably went up --

21 MR. WATNICK: -- it was.

22 THE COURT: It probably went up then. But in any
23 event, what you're saying is that if she -- she elected to
24 -- made a decision that she has \$16.8 million in stock. She
25 knows she can earn \$10 million a year for the three years in

1 non-compete. She made an economic decision to try to ride
2 up the stock instead of earning that \$10 million. Why
3 should that be something that the estate compensates her
4 for. That's not an economically rational decision. I
5 wouldn't make that decision. If I had the ability to earn
6 \$10 million a year versus some lower amount, although one
7 could argue that my taking this job was not an economically
8 rational decision, but that's a different story.

9 It just -- what I'm trying to say to you in the
10 nicest possible way is it just doesn't add up. It just
11 doesn't add up to a claim for cash for which the Lehman
12 estate ought to be liable. I think she should have a claim
13 that's at the level of equity and that's at the level of
14 other claims that are subject to 510(b). And I think the
15 basis for that is, as has been articulated, by Lehman and
16 independently, frankly, as I said, I think that the claim
17 doesn't survive a 12(b)(6) type motion to dismiss.

18 But I heard Mr. Miller say that they're happy to
19 give her an allowed claim in the amount of the \$30 odd
20 million at the level of equity and I think that's the
21 disposition.

22 MR. WATNICK: Okay.

23 THE COURT: But I thank you for coming in.

24 MR. WATNICK: Thank you, Your Honor. I appreciate
25 your hearing the claim.

1 THE COURT: Okay. Thank you.

2 MR. WATNICK: Okay. Good day.

3 MR. MILLER: Your Honor, we do have an order and a
4 disc which we will provide --

5 THE COURT: Okay.

6 MR. MILLER: -- to the Court.

7 THE COURT: And would you share it with Mr.
8 Watnick before you --

9 MR. MILLER: Yes.

10 THE COURT: -- give it to us.

11 MR. MILLER: Yes, Your Honor. This is Ralph
12 Miller again. The proposed order was attached to our --

13 THE COURT: Okay. With no changes.

14 MR. MILLER: -- response, and it's not changed.

15 THE COURT: Okay.

16 MR. MILLER: And it does provide that it will be
17 at the level of LBHI common stock.

18 THE COURT: Okay. Very good. Thank you.

19 MR. WATNICK: I will -- I don't expect comments,
20 but I'll make -- I'll let you know.

21 Thank you, Your Honor.

22 THE COURT: Thank you.

23 Give me one moment.

24 (Pause)

25 THE COURT: Okay. I think next on the agenda is

1 --

2 MR. FAIL: Your Honor, Item Number 7, Stonehill's
3 motion.

4 THE COURT: Stonehill. Yes. Mr. Brilliant.

5 (Pause)

6 THE COURT: How are you today?

7 MR. BRILLIANT: Doing well, Your Honor. I have a
8 little bit of a -- I wouldn't say laryngitis, but a little
9 bit of a cold. So --

10 THE COURT: All right. Well, I'll try to --

11 MR. BRILLIANT: -- if you have any trouble hearing
12 me --

13 THE COURT: -- I'll try to go easy on you. Most
14 of my family had that same thing and it takes a while to go
15 away.

16 MR. BRILLIANT: It does, Your Honor. Go as hard
17 as you want, but if you have any trouble hearing me, please
18 let me know.

19 THE COURT: Okay. So let's cut right to the
20 chase.

21 MR. BRILLIANT: Sure, Your Honor.

22 THE COURT: Okay. So the main things that
23 interest -- interested me -- interest me here are the notion
24 that while you may not have known the amount of the
25 diminution of value, you knew all the securities by their

1 names, so to speak. And in the proof of claim it's not --
2 nothing's there. Nothing's there. The only thing -- and
3 you say it in your papers, and I'll try to find the
4 reference. You say in your papers that in the proof of
5 claim you made it clear that this was including the
6 diminution of value.

7 And then when I looked at the proof of claim, at
8 least the one that I'm looking at, what I see is that -- all
9 I see is the sentence that says, this is in paragraph 4 of
10 attachment to proof of claim of Stonehill Offshore Harbors,
11 Ltd., I see the sentence, "The failure of LBI to return
12 claimant's cash and securities therefore constitute a breach
13 of the PB agreement by the debtor and the other Lehman
14 entities." That's -- so those are -- that's like the
15 bookends. I see that --

16 MR. BRILLIANT: Okay.

17 THE COURT: -- which clearly, as you say, refers
18 to the failure to return the securities. But on the other
19 hand, Lehman has, I think, made an interesting point that,
20 you know, you could have -- there could have been a list.
21 You knew that all the securities were. You could have had a
22 list and next to each one of those securities it could have
23 said, unliquidated or TBD or something like that.

24 So if you could focus --

25 MR. BRILLIANT: Sure.

1 THE COURT: -- at least the beginning part of your
2 comments on those two --

3 MR. BRILLIANT: Thank you, Your Honor.

4 THE COURT: -- things.

5 MR. BRILLIANT: Okay. And, Your Honor, I'm going
6 to do a really hard job to listen to you and let you talk as
7 well as respond. And if --

8 THE COURT: Okay.

9 MR. BRILLIANT: -- if I'm not doing that you
10 please --

11 THE COURT: I will.

12 MR. BRILLIANT: -- point that out.

13 THE COURT: You know I will.

14 MR. BRILLIANT: But I think, Your Honor, I think
15 you're right. I think the place to start is with the proof
16 of claim.

17 THE COURT: Okay.

18 MR. BRILLIANT: And I think -- and I think it's
19 also important to start with the claim understanding what it
20 is that a proof of claim is as distinct from a complaint.

21 And so if we turn to the -- you know, the proof of
22 claim, Your Honor, and as Your Honor, you know, knows, the
23 amount that's claimed is not less than \$23,460,716 in the
24 one example. There's two different proofs of claim, as Your
25 Honor knows, for the two different funds.

1 THE COURT: Right.

2 MR. BRILLIANT: And a similar proof of claim was
3 filed against each of the debtors.

4 And then if Your -- Your Honor, you know, looks at
5 the claim itself, you know, in 9(2) it says, basis for the
6 claim and it says, see instructions number two on reverse
7 side. And the reverse side of the claim is attached here.
8 And if you go to number two it says, "Basis for claim, state
9 the type of debt or how it was incurred. Examples include,
10 good sold, money loaned, services performed, personal
11 injury, wrongful death, car loan, mortgage note, and credit
12 card." So, you know, all the proof of claim asks for is a
13 general understanding s to where the claim arises. And here
14 the basis for the claim says, "Prime brokerage agreement.
15 See attachment."

16 So that's kind of where we start out. What were
17 you asked to do? Give the basis of your claim: "Prime
18 brokerage agreement. See attachment."

19 So then we turn to the claim itself and at the end
20 of paragraph 3 -- I'm going to get right to the point that
21 Your Honor pointed out a minute ago. But if you get to the
22 end of paragraph 3, the last sentence it says, "As a party
23 to the PB agreement, the debtor is fully liable for all
24 amounts owed to the claimant in connection with the PB
25 agreement." Now, again, no specificity as to what that is,

1 but just saying you're responsible for all damages related
2 to the PB agreement.

3 Four says, "as claimant sole prime broker and
4 pursuant to the PB agreement, LBI had custody of the
5 substantial portion of claimant's assets, including both
6 cash and securities." So it's talking about what did they
7 have, a substantial portion of the assets and then it goes
8 on in saying that they're responsible for settling all
9 trades and they're responsible for turning over the
10 securities or doing with them what the client wants with the
11 securities as a matter of the contract, custom, you know,
12 and SEC regulations.

13 The last sentence in four says, "The failure of
14 LBI to return claimant's cash and securities, therefore
15 constituted a breach of the PB agreement by the debtor and
16 the other Lehman entities." Now it says very clearly that
17 the failure to return claimant's cash and securities. Now
18 you're right, Your Honor. It's not attached and listed as to
19 what they are. And as the Washington -- as the Court in the
20 Washington case that we cited in our brief says, if there
21 was perfect analysis we wouldn't have hearings about -- on
22 these issues.

23 So we agree with Your Honor that it's general.
24 "The failure to return claimant's cash and securities
25 constituted a breach of the PB agreement by the debtor and

1 the other Lehman entities."

2 THE COURT: So -- but then keep going, right?

3 MR. BRILLIANT: Okay.

4 THE COURT: Okay.

5 MR. BRILLIANT: So then, Your Honor, the next, you
6 know, paragraph in paragraph 6 really start to talk about
7 certain specific things.

8 THE COURT: Right. But you said --

9 MR. BRILLIANT: Right.

10 THE COURT: -- about paragraph 5, right --

11 MR. BRILLIANT: Right.

12 THE COURT: -- because there's that nice little
13 heading that says, "claims arising under PB agreement,"
14 right? So we just told you that our claims arise under the
15 PB agreement. And that little heading kind of announces --

16 MR. BRILLIANT: Yeah.

17 THE COURT: -- now I'm about to tell you what
18 those claims are.

19 MR. BRILLIANT: Your Honor, as Your Honor knows,
20 when you see a contract usually there's a provision that
21 says, you know, the headings don't mean anything.

22 THE COURT: Headings don't mean anything. Right.

23 MR. BRILLIANT: And I would say, Your Honor, that
24 in this context, especially where we're talking about, you
25 know, notice pleading, the headings don't mean anything.

1 The sentence ahead of -- above that says, there's a breach
2 of the contract by not turning over the securities.

3 Now, you know, would it be easier for me if it
4 said, claims arising out of the PB agreement was right above
5 that? Yeah. It would be easier for me, but I don't think
6 it changes the legal analysis here one iota, the fact that
7 it comes right afterwards.

8 But you're right. The next paragraph, you know,
9 talks about the goods, you know, the securities that were,
10 you know, being held by the entity. And it says that, you
11 know, the majority of the assets had been returned by now
12 because, you know, about nine months had passed between the
13 -- well, a year before the bar date in connection with the
14 bankruptcy filing itself. But about nine months had occurred
15 since the SIPA proof of claim.

16 And so they -- we say in here that the majority of
17 the assets have been returned, and that's in paragraph 6 in
18 the second sentence: "Between the commencement of the SIPA
19 proceeding and the date of this claim, the majority of
20 claimant's securities and a portion of claimant's cash have
21 been returned. However, as of the date" -- and then we go
22 through and we list all the things that are still
23 outstanding. And those, Your Honor, by and large are the
24 liquidated claims.

25 THE COURT: Right.

1 MR. BRILLIANT: And you -- if you have any doubt
2 about that, you know, you can see that in paragraph 7 where
3 it says, "The amounts described above in the aggregate equal
4 to approximately 23 million plus the additional unliquidated
5 amounts. And if you add up all the stuff in 26 you get to
6 the 23,406.

7 THE COURT: Right.

8 MR. BRILLIANT: So, clearly, there's a
9 contemplation here that it's more than just these individual
10 securities that are being held. And we're saying they held
11 all of our securities. Their failure to turn them over to
12 us as we requested was a breach. And, you know, and then we
13 say, and we're holding them responsible at the end, you
14 know, but -- and there's a lot of stuff in between which I
15 think is important that we talk about before --

16 THE COURT: Okay.

17 MR. BRILLIANT: -- we get there. But at the end
18 we say, you know, and we're holding you responsible for all
19 direct and indirect damages relating to what's discussed
20 above, the breach.

21 So, Your Honor, then -- now if all we wanted was
22 the securities back and it's just the attachment -- you
23 know, look, I freely concede they're right. The attachment
24 at the point in time -- at that point in time was just the
25 securities that were still being held, not the ones, you

1 know, that we had gotten back.

2 But if that's all we wanted to say, then you don't
3 need to say, eight and nine and ten and eleven and twelve
4 and thirteen. But what we did in eight to make it
5 absolutely clear that we're saying you're responsible for
6 all this stuff is we say, you know, the amounts owed are
7 recoverable as -- you know, by claimant as a result of
8 willful and material misrepresentations, and we go on and
9 talk about how they told us, you know, Lehman officials
10 called Mr. Metulsky (ph) and told Mr. Metulsky, don't worry.
11 You're okay. Everything's going to be great. Lehman's not
12 going to file. Leave your securities with us.

13 And so there's no reason to say that if all we
14 wanted was our securities back on the basis of, you know,
15 the fact that we had. But we're letting the party know --
16 again, general notice principals here -- that there's a
17 claim for mis -- in addition to the contractual claim for
18 not turning over the securities, there's a claim for
19 misrepresentation. There's a claim, you know, for fraud. I
20 mean, let's not kid ourselves, as to the fact that we were
21 told, leave them here. It will be okay.

22 And so if you -- you read -- you know, eight
23 through twelve, and then thirteen, which reads at the
24 beginning, "Thus by virtue of the public misrepresentation
25 of Lehman Brothers and private representations by Mr.

1 Wickham (ph), Lehman Brothers' agent directly to SEM which
2 misrepresentations were intended to convince Lehman
3 Brothers' customers and counterparties in general and SEM in
4 particular, the financial stability and health despite the
5 fact" -- blah, blah, blah.

6 You know, we're making it absolutely clear that
7 there's -- that the claim involves this whole range of
8 conduct, you know, inducing based on misrepresentations, you
9 know to Stonehill to keep their securities there and then
10 not turning them over after -- you know, timely after the
11 bankruptcy and leading to direct and indirect damages, you
12 know, to the Stonehill entities.

13 Now that, Your Honor, ends up at the end of
14 thirteen, you know, and then fourteen says, "Claimant is
15 entitled to and is asserting against Lehman entities,
16 including the debtor, the full amount of the claims arising
17 under the PB agreement, notwithstanding the SIPA claims."
18 So we're saying we're suing holding the Lehman entities
19 liable with respect to all these things as well as the SIPA
20 entities.

21 And then, Your Honor, you know, again, I wish the
22 headings weren't here, but they are. I don't think they
23 mean anything here, especially when you look at -- so then
24 it says, "reservation of rights," fifteen then says, "No
25 payments have been made to claimant on account of the

1 claims." That's clearly not a reservation of rights type
2 provision. It's in the wrong place.

3 And then "Claimant reserves all of its rights to
4 supplement the claim." We're not relying on that, but it's
5 clearly -- you know, it's in there. And then seventeen is a
6 reservation of rights issue, and then eighteen, which really
7 doesn't have anything to do with reservation of rights, but
8 really brings forward all of the language prior to that and,
9 you know, all the way through thirteen. And it says, "To
10 the extent not set forth in this claim, claimant also makes
11 claim for all direct, indirect, nominal or consequential
12 damages, interests, costs, attorney's fees, and other
13 amounts owed or owing to it to the extent recoverable under
14 the applicable agreement or applicable law," and then it
15 just, you know, goes on.

16 And it's -- it says it's directly related to the
17 manners discussed in the claim. It's not just a boiler
18 plate language that just says, in addition to -- we're
19 including interest and fees and other things. It's the
20 things that are discussed and related to the claim. All the
21 issues here that you made misrepresentations to us, that you
22 didn't turn over our securities when you were required to,
23 that that was a breach of the agreement and that we're
24 asserting all of our direct and indirect claims.

25 THE COURT: Okay. Thank you.

1 MR. BRILLIANT: So, you know, Your Honor, I think
2 the issue as to, you know, it doesn't say anywhere in here
3 that the claims are just related to the ones that were still
4 being held. Clearly, those are delineated in the one
5 paragraph.

6 THE COURT: But --

7 MR. BRILLIANT: But --

8 THE COURT: -- let's go one more round and --

9 MR. BRILLIANT: Okay.

10 THE COURT: -- tell me -- I'm reading this and
11 what is it in the attachment to the proof of claim that puts
12 me on notice that you're going to make a claim for the
13 diminution in value of the securities that warrant return.

14 MR. BRILLIANT: I think what we're -- we say in
15 here specifically that we're -- you know, in paragraph four
16 that their failure to return them timely was a breach of the
17 agreement. In paragraphs eight through thirteen we say that
18 we left them there because of the misrepresentations of the
19 Lehman entities, the representations of the Lehman entities.
20 And then in eighteen we say that we're holding them
21 responsible for all direct and indirect consequences that
22 are related to the breach which, you know, is, Your Honor,
23 diminution in the value.

24 I mean, there could be other claims related to
25 that that adversely affected the business, things of that

1 sort. But we're not raising those. The ones we're raising
2 are the fact that there's a diminution in the value of the
3 claims.

4 Your Honor, like I said, this is notice pleading.
5 I mean, the -- what Lehman would like you to believe, and I
6 think it could be a really bad precedent here, is they're
7 basically saying, that portion of the claim which was
8 liquidated, you know, the 26 million and in connection with
9 the other one -- the other amounts, that's -- you know, when
10 you read their papers you really see this with their chart
11 and everything. They say, that's the only claim you made.
12 You didn't make any other claim. All you claimed was for
13 the amount that you specifically liquidated.

14 But I don't think you could read it that way here
15 where we talk specifically about a breach of contract,
16 unliquidated amounts, indirect -- direct and indirect claims
17 arising from the breach of contract. But -- so I don't
18 think that it's appropriate to read it that way. But even
19 if Your Honor got there and said, okay, you know what? It
20 just doesn't put me on notice specifically of this specific
21 claim -- and I don't think we needed to use the word
22 diminution. You know, again, I concede to you we wouldn't
23 be here if it had that. Right. But we don't have to use
24 the word diminution to put the party on notice of the fact
25 that we had this claim. We say they breached the contract.

1 They misrepresented why -- you know, what was happening to
2 keep them there and we're holding you responsible for the
3 damages.

4 But even if Your Honor got there and reached a
5 conclusion that, you know, it's just not specific enough,
6 you know, the amendment rules or that a claim should be
7 freely amended, you know, if there's enough in here, it
8 arises out of the same occurrence and transaction that's
9 described in the complaint. And I don't see how anyone can
10 really say here, given that we describe the
11 misrepresentations, the breach of the agreement, you know,
12 that a diminution claim doesn't arise out of the same
13 transaction.

14 So if it arises out of the same transaction, you
15 know, an amendment should be freely allowed unless there
16 would be -- it would be inequitable to do so and we don't
17 believe on this record there's any likelihood that Your
18 Honor could find it's inequitable. This was not filed.

19 This claim, unlike the Calpine (ph) case, which
20 they say which this language is under very different facts
21 which was filed on the eve of confirmation of the plan and
22 was -- you know, had the potential to interfere with the
23 confirmation. Also, the bankruptcy judge in that case and
24 the District Court both found that the claim, as a matter of
25 law, was invalid, you know, also finding that it was --

1 shouldn't be amended to be allowed which is not our
2 situation here where, you know, they're not arguing anything
3 about the merits at this point and it's subject to another
4 day.

5 So, you know, it just would seem that for -- you
6 know, that if Your Honor was to reach a conclusion that, you
7 know, it kind of says it, but it doesn't really specifically
8 say it, then you shouldn't allow us to amend to provide for
9 it because there's no prejudice to them other than the fact
10 that if our claim is allowed we will get a larger portion of
11 the claims pool than we -- you know, than we might otherwise
12 get. But it's not going to -- it didn't change their --

13 THE COURT: Right. I think the prejudice --

14 MR. BRILLIANT: -- conduct at all.

15 THE COURT: I think the prejudice that they also
16 elude to is other similar amendments where -- in their view
17 of the world this is a new claim, and if I allow it others
18 are going to show up with new claims. And I'm actually
19 curious to know other claimants who suffered the same things
20 that Stonehill did, the failure to have their securities
21 returned, what their proofs of claim look like for this
22 aspect.

23 MR. BRILLIANT: Your Honor, I don't -- you know,
24 the debtors may know.

25 THE COURT: They may know.

1 MR. BRILLIANT: I don't know whether anybody else
2 has asserted this type of -- you know, Stonehill --

3 THE COURT: I'm guessing that you're not the only
4 ones who didn't get their securities back when they asked
5 for them.

6 MR. BRILLIANT: Ultimately, they got them back.
7 It's just a question --

8 THE COURT: Right. They --

9 MR. BRILLIANT: -- it's a question of time and --

10 THE COURT: The diminution in value. Right.

11 MR. BRILLIANT: And Your Honor, you know,
12 understand that when you're a hedge fund and you have all
13 your securities at a prime broker and you don't have any
14 securities and you don't have any assets, you don't really
15 have a business. Right. So --

16 THE COURT: Right.

17 MR. BRILLIANT: So, you know, clearly Stonehill
18 was put in a very untenable position for a period of time
19 and was damaged. And we made it clear in the complaint, I
20 believe, that we were going to hold Lehman liable for the
21 full amount --

22 THE COURT: Right. But that --

23 MR. BRILLIANT: -- of direct and indirect damages.

24 THE COURT: That damage and then --

25 MR. BRILLIANT: Right.

1 THE COURT: -- there's also the diminution in
2 value of the securities. In other words, if you had gotten
3 the securities back you could have liquidated those
4 positions, right?

5 MR. BRILLIANT: Well, could have done that or
6 could have done a lot of things with them. That's right.

7 THE COURT: Could have done a lot of things.

8 MR. BRILLIANT: But that's the --

9 THE COURT: Right.

10 MR. BRILLIANT: And in that point in time we were
11 not able to do it. And, you know, clearly how that damage
12 would be calculated, you know, was not ascertainable at that
13 point. I'm sure now maybe you can tell from their papers
14 they dispute the methodology we use.

15 And, you know, the Second Circuit and this Court
16 says, you know, an unliquidated claim is something that
17 can't be easily ascertainable. What your damage was by not
18 getting your securities back for a number of months is not
19 something that is freely ascertainable by publicly available
20 sources. So it clearly was an unliquidated claim.

21 But, Your Honor, you know, I think you have to
22 deal with our claim as our claim and, you know, there's no
23 evidence in the record of other people coming in, what they
24 might do and, quite frankly, I mean, it -- you know, I don't
25 know that it's necessarily -- if they filed proofs of claim

1 which put the debtor on notice that they might have claims
2 for direct damages, for the breach of contract. You know, I
3 suspect that other people may have raised claims, but I'm
4 not aware of any, Your Honor. As far as I know, we're the
5 only one in this --

6 THE COURT: And then --

7 MR. BRILLIANT: -- situation.

8 THE COURT: -- I guess there's a question also as
9 to why it took as long as it did to get to this point, which
10 is a fair question.

11 MR. BRILLIANT: Yeah. It is, Your Honor. And,
12 you know, it's -- it just is what it is. I mean, I think --
13 as Your Honor knows we're here in really a kind of a strange
14 procedural basis. If not for their seeking to lower the
15 reserve we wouldn't even be here now.

16 THE COURT: But that's exactly my point. One
17 wonders what would have happened, right? So they had sought
18 to lower the reserve, right?

19 MR. BRILLIANT: Uh-huh.

20 THE COURT: And it kind of teased this issue out.

21 MR. BRILLIANT: Well, that --

22 THE COURT: Did they --

23 MR. BRILLIANT: As I said, I promised you I was
24 going to let --

25 THE COURT: Go ahead.

1 MR. BRILLIANT: -- you talk, but --

2 THE COURT: Go ahead.

3 MR. BRILLIANT: -- that's not right.

4 THE COURT: Okay.

5 MR. BRILLIANT: Okay. So in November of 2012 they
6 sent us some discovery and we responded to their discovery,
7 and then we started to have some conversations with them,
8 you know, about the claim.

9 Now Your Honor had intimated in the reserves that
10 that -- we're trying to jump the line. It's not a question
11 of jumping the line. I think all the creditors would like
12 to have their claims resolved.

13 THE COURT: Sure. So in the --

14 MR. BRILLIANT: But --

15 THE COURT: -- course of that discovery you --

16 MR. BRILLIANT: We gave them the chart that's
17 attached --

18 THE COURT: -- you gave them --

19 MR. BRILLIANT: -- here.

20 THE COURT: Okay.

21 MR. BRILLIANT: And so they had that, you know, a
22 long time even before the reserve motion. So they were
23 aware that we had this claim.

24 THE COURT: Okay.

25 MR. BRILLIANT: But I think, Your Honor, the thing

1 is -- and Your Honor knows that the way the claims
2 adjudication process works in a typical case, and it's set
3 up for a Chapter 7 case and a Chapter 13 case and a mega
4 Chapter 11 case, the largest case ever --

5 THE COURT: Well, don't talk about 13 because it's
6 totally different.

7 MR. BRILLIANT: Yeah. Yeah. Okay. Well, but
8 people file a proof of claim.

9 THE COURT: Right.

10 MR. BRILLIANT: Okay. So you file a claim. You
11 put the debtor on notice. There's nothing in the statute or
12 the rules that require --

13 THE COURT: It's kind of like an opening bid.

14 MR. BRILLIANT: Right. Well, we --

15 THE COURT: Right?

16 MR. BRILLIANT: And like I said, we showed you --
17 like the language. It's just put them on notice of
18 generally --

19 THE COURT: Right.

20 MR. BRILLIANT: -- how much you owe them, how much
21 you think they owe you, and where it comes from. Right.
22 And then until they object to the claim, you know, there --
23 or you -- and you start a claims adjudication process, not
24 really much happens with claims. I don't think most people
25 who file claims sit around and say, oh, you know, I just

1 sold something. I've now quantified my loss. I --

2 THE COURT: Well, when it gets --

3 MR. BRILLIANT: I need to go back and --

4 THE COURT: If you've filed a large unliquidated
5 claim, then when it gets to be plan time there's a lot of
6 action because --

7 MR. BRILLIANT: Potentially. If -- because -- and
8 I say potentially because here there wasn't, right?

9 THE COURT: Right.

10 MR. BRILLIANT: If you want to vote your claim,
11 you have to come in and file the motion under 3018 and to
12 vote it.

13 THE COURT: Right.

14 MR. BRILLIANT: We didn't do that here. We didn't
15 -- you know, we were given a valid presumably. You know, I
16 don't know for sure, but presumably --

17 THE COURT: Right. So you just --

18 MR. BRILLIANT: -- Stonehill voted --

19 THE COURT: -- were willing to be one of the great
20 unwashed masses.

21 MR. BRILLIANT: Right. And then the other thing
22 about this plan is it says, whatever the face amount of your
23 claim is, that gets reserved forward. And so we had 20
24 claims at \$40 million.

25 THE COURT: Right.

1 MR. BRILLIANT: We were getting a reserve for \$875
2 million. We -- you know, we didn't think we were owed the
3 entire amount of \$875 million.

4 THE COURT: Right. So life was good.

5 MR. BRILLIANT: We thought we were owed \$200
6 million, so why do we need to come in and adjust that.
7 We're okay with that.

8 So the answer is, so why aren't we here sooner?
9 I'm not saying it's because they haven't objected to our
10 claim sooner, but I think that is a -- the reality of it.
11 It's because there was no reason to be here, you know,
12 sooner. There's -- and I think that's kind of where we are.

13 THE COURT: Okay.

14 MR. BRILLIANT: You know, the only other thing I
15 would say, Your Honor, and then I'll sit down and -- unless
16 you have other questions and let Mr. Fail speak, which is,
17 you know, this whole issue of prejudice. Leaving aside the
18 issue of opening the flood gates, which I don't think is
19 really the appropriate analysis when we look at individual
20 claims to take away someone's rights because it could have
21 been a little more specific and if I let you be more
22 specific other people may show up. I don't think that's
23 really appropriate.

24 But, you know, in the Midland (ph) case, you know,
25 the Court was very clear that just the fact that there would

1 be any diminution or a lower distribution to other claims
2 can't be the be all and end all of things because if that
3 were right then no one -- and that's in the context of a
4 late claim, not in connection with an amended. But, you
5 know, the Second Circuit says that can't be right because if
6 that were the case than you could -- no -- excusable neglect
7 could never overcome that burden.

8 So I don't think that that's really an issue. So
9 our sense, Your Honor, is that if this would have been a
10 smaller case and been dealt with in a different way. They
11 would have filed an objection to our claim. We would have
12 had a hearing in front of Your Honor. We would have said,
13 we're owed \$150 million for the diminution as well as 40
14 million of securities we haven't gotten back. So we have a
15 \$200 million claim, they might have at that point raised the
16 issue and said, oh, you know, that's a new claim and that's
17 barred. And Your Honor at the hearing would have made a
18 decision as to whether or not you thought that it related
19 back or was improperly claimed.

20 Instead, because of the reserve issue, we ended up
21 in a slightly different posture.

22 THE COURT: All right. Thank you.

23 MR. FAIL: Good afternoon, Your Honor.

24 THE COURT: Good afternoon.

25 MR. FAIL: Garrett Fail, Weil Gotshal for Lehman

1 Brothers Holdings, Inc.

2 If I might, Your Honor, I was taking some notes as
3 Mr. Brilliant went through and explained what was clear to
4 him, but I see it clearly a different -- in a different way.

5 I don't mind starting out looking at the proofs of
6 claims themselves. Mr. Brilliant skipped over a few words
7 that I think are --

8 THE COURT: Okay. Why don't we do --

9 MR. FAIL: -- are critical.

10 THE COURT: -- that first?

11 MR. FAIL: So looking to the proofs of claim in
12 paragraph 6, this is where we -- you know, the debtor and
13 the plan administrator viewed the references to the
14 securities and that there were two of them as we said in our
15 proof of claim. There was a statement between the
16 commencement of the SIPA proceeding and the date of this
17 claim. The majority of claimant's securities and a portion
18 of claimant's cash have been returned. So that basically is
19 consistent with the fact that we got a list of securities
20 and the majority -- everything else was returned. Okay.

21 The subsequent sentence then says, Your Honor,
22 that the estimated value of the securities held by LBI is
23 \$395,473.59 for Stonehill Offshore and \$494,863.23 for
24 Stonehill Institutional, very specific amounts. But -- and
25 not insignificant, but yet they total roughly \$890,000. So

1 in the scheme of Lehman Brothers cases something that falls
2 on the smaller scale.

3 The claims that you pointed out did not include
4 any assertion that Stonehill securities had lost or may lose
5 value while in LBI's custody. And you can see that when one
6 wants to do that in the new claims in paragraph nine through
7 eleven they were able to articulate that with the lead in
8 that says, additional leave. They use the word additional
9 leave. They add it in in the blackline that we show. It's
10 apparent, a way to explain when one wants to claim
11 additional amounts.

12 The original claims did not identify any of the
13 \$240 securities that are proposed to be amended or annexed,
14 which we think are new late claims which were returned to
15 Stonehill prior to the bar date.

16 So this is one of the things I don't think adds
17 up.

18 Mr. Brilliant articulated that it was difficult to
19 value certain securities. But Stonehill was able to
20 articulate a value on a certain date for certain securities,
21 yet for 200 -- for the other ones that they had back in
22 their possession, as Mr. Brilliant just said for nine
23 months. We don't know exactly when the securities were
24 returned because LBI returned them and not any of the
25 Chapter 11 estates. But they've had those in their

1 portfolio and it's a portfolio. It's an investment company.
2 It's a hedge fund.

3 So we -- one would rationally assume and
4 reasonably assume that Stonehill knew what its portfolio was
5 at different points in time and lost value, and if it
6 believed it lost value would have claimed that. But that's
7 not in the claim.

8 So taken together the only reasonable conclusion
9 that could be drawn was that the original claims didn't
10 include diminution of claims. Perhaps the securities went
11 up in value as did certain of Stonehill securities that are
12 shown on the list.

13 But paragraph six says more. It claims a
14 particular dollar amount for particular securities and
15 doesn't include a reservation of rights with respect to
16 those securities. Okay. That's --

17 THE COURT: Where are you now?

18 MR. FAIL: In paragraph six of the original
19 claims. The language that I just read was specific dollar
20 amounts referring to specific securities. It does not
21 include a reservation of rights with respect to the
22 securities. And I would like to just draw your attention in
23 contrast the same paragraph lists particular dollar amounts
24 for seven cash components of Stonehill's claims. But it
25 includes the following reference with respect to such cash

1 components. In addition to the foregoing, interest may be
2 payable or claimable on the cash balance as described above.

3 THE COURT: Right.

4 MR. FAIL: And additional amounts -- and
5 additional misdirected wires and/or other amounts may have
6 been received by LBI. So they knew how to add on things.

7 Paragraph seven --

8 THE COURT: But --

9 MR. FAIL: -- then says --

10 THE COURT: Right. But that's all -- this is all
11 -- this is all on these little buckets of cash claims.

12 MR. FAIL: That's my point exactly, Your Honor.

13 THE COURT: Okay.

14 MR. FAIL: This is an exception saying I'm owed
15 specific dollars and cents in different foreign currencies
16 calculated very specifically and accurately --

17 THE COURT: Right.

18 MR. FAIL: -- and these all total to the front
19 page of the claim.

20 THE COURT: Sure.

21 MR. FAIL: So there -- for these there was no
22 notice that it might change a little bit. LBI might have
23 received a little bit more cash post-petition. Interest may
24 be payable on this cash that I may be entitled to. So one
25 might say we were reasonably on notice of that.

1 But then look further down on page -- on the
2 bottom of page 4, the last bullet, it says, in addition to
3 the foregoing -- and so that's what I was quoting.

4 THE COURT: Right.

5 MR. FAIL: Cash balances described above.
6 Paragraph seven says the amounts described above aggregate
7 approximately -- equal to approximately \$23,460,716 plus the
8 unliquidated amounts referenced above. So it's not any
9 unliquidated amounts. It's not any things that we're
10 totaling. It's the amounts described above, the specific
11 amount for the specific securities plus cash plus
12 unliquidated cash components. There's no unliquidated
13 securities component.

14 Then let's move onto paragraph B.

15 THE COURT: Wait. Hold on.

16 MR. FAIL: Uh-huh.

17 THE COURT: Hold on. So what you're saying is
18 that I should read paragraph six and there's all these
19 bullets, and then the last bullet in paragraph six says,
20 there may be additional stuff and I should --

21 MR. FAIL: There may be additional cash stuff.

22 THE COURT: Right. And I should refer and then
23 when -- in seven when it makes the reference to plus the
24 additional unliquidated amounts referenced above --

25 MR. FAIL: Mr. Brilliant didn't read those two

1 words, referenced above, or I didn't hear him --

2 THE COURT: Okay.

3 MR. FAIL: -- read those.

4 THE COURT: That I should only be looking back to
5 that bullet immediately preceding.

6 MR. FAIL: You could look above to see that. Yes,
7 because that's where the calculations total approximately --

8 THE COURT: Okay.

9 MR. FAIL: -- 23 million --

10 THE COURT: So then to Mr. Brilliant's point, then
11 --

12 MR. FAIL: In paragraph eight familiarly leads in
13 with a discussed above. It's not just generally the amounts
14 owed under the prime brokerage agreements. It's --

15 THE COURT: But it's not --

16 MR. FAIL: -- those that are discussed above.

17 THE COURT: But it's not -- paragraph eight
18 doesn't say the cash amounts owed under the PB agreement.
19 It says, the amounts under the PB agreement discussed above
20 --

21 MR. FAIL: I agree.

22 THE COURT: -- are also recoverable by claimant
23 as, and then --

24 MR. FAIL: That's a theory. Right.

25 THE COURT: -- it -- right. It goes on to --

1 MR. FAIL: I'm not saying they didn't assert that
2 890,000 is owed. But it's not -- they didn't -- they don't
3 have an unliquidated amount. That's a theory and they want
4 to add another theory to claim the 890. What they don't
5 have a theory for is \$153 million on top of the 890.

6 The difference is the amount, not that they --
7 that they ever claimed securities. You found it. Mr.
8 Brilliant explained it. They asked for \$890,000 in
9 securities. They didn't ask for \$153 million in securities.
10 They didn't put a place saver --

11 THE COURT: But now -- but --

12 MR. FAIL: -- for that.

13 THE COURT: But the -- back in paragraph four they
14 say, the failure of LBI to return claimant's cash and
15 securities constitutes a breach and it's clear that the
16 story that's being told is designed to put some meat on the
17 bones of what the breach is. And then it says, paragraph
18 fourteen says, claimant is entitled to assert and is
19 asserting against the Lehman entities, including the debtor,
20 the full amount of claims arising under the PB agreement,
21 notwithstanding the pending SIPA claim.

22 MR. FAIL: We read it the way you read it, Your
23 Honor. The reasonable way to read it; that the caption that
24 said the claims under the prime brokerage agreement were
25 setting forth their claims. And had the debtor not objected

1 to these claims, they would have been deemed prima facie --
2 the debtor hasn't. So barring any objection, they would be
3 deemed prima facie valid.

4 They've already received over \$86 million on
5 account of these claims which we've discovered through the
6 discovery. Accordingly, based on the single recovery rule,
7 there would be no distributions under these claims. So --

8 THE COURT: All right. Now you've lost me. So
9 what does this have to do with --

10 MR. FAIL: We were not on notice that there was
11 additional amounts that would be owed. This claim
12 replicates a customer claim against LBI. LBI has satisfied
13 customer claims in full with an exception of an \$11 million
14 cash component, which is set aside because it's not being
15 amended. The reasonable interpretation and the
16 interpretation of the debtors were under was that this claim
17 asked for \$890 (sic) in securities for which they received
18 back at a value higher. When they received it, they were
19 worth, according to the schedule on Stonehill's schedule \$86
20 million. It -- that's just according to the schedule. You
21 calculate the --

22 THE COURT: I'm sorry, Mr. Fail, but you have
23 completely lost me. I don't understand what they've already
24 recovered has to do with whether or not I read this claim
25 now to give them a basis for asserting whatever their

1 entitled to assert with respect to the diminution in value
2 of the securities as a result of the failure to have
3 returned their securities. That has to do with, at the end
4 of the day, the amount of their distribution. It doesn't
5 have to do with the amendment of the claim. So I'm --
6 you've got to straighten me out because I'm just confused.

7 MR. FAIL: Okay. I think we could start from the
8 fact that they're trying to -- the face of the claim says
9 \$40 million -- \$44 million in aggregate, let's say, 20 on
10 one, 23 on the other. And so the motion today is to take
11 the claim --

12 THE COURT: It says not less than.

13 MR. FAIL: Yes.

14 THE COURT: Right?

15 MR. FAIL: It says not less than.

16 THE COURT: It says not less than.

17 MR. FAIL: It says not less than.

18 THE COURT: Okay.

19 MR. FAIL: And then the components that total that
20 --

21 THE COURT: Right.

22 MR. FAIL: -- include cash plus additional amounts
23 for cash --

24 THE COURT: Right.

25 MR. FAIL: -- and securities in a fixed amount.

1 And so the notice that was provided to the plan
2 administrator with respect to those claims were that they
3 wanted cash in fixed amounts and they wanted \$890,000 for 54
4 securities. Before the motion was filed today, that's what
5 the claim was -- would lead any reasonable person to
6 believe.

7 Stonehill now wants to re-file the claims, not
8 call it an amendment, but say they don't want 54 securities,
9 but there were 281 and it wasn't \$890,000 that they were
10 asking for. It was \$153 million. And they're saying that
11 that is a proper amendment if one were to look at it. And
12 the standard for amendments is, was the debtor on reasonable
13 notice of it. We don't believe that based on looking at the
14 claims there was reasonable notice.

15 Another factor in the amendment standard is is the
16 amount reasonably close, the amended amount reasonably close
17 to the amount asserted in the original claim. There's no
18 case that cites -- that anyone could cite that says 173
19 times the original amount is reasonably close or similar.
20 Courts have disallowed amendments where there was a single
21 digit multiple and we've cited those. We've cited cases
22 that stand for the proposition when a taxing authority
23 wanted to increase a claim from \$2 million to -- from \$2,000
24 to \$2 million. A \$2,000 claim doesn't provide reasonable
25 notice for a \$2 million claim.

1 And so an amendment --

2 THE COURT: But are you -- I'm still not
3 understanding. Are you -- and maybe I'm conflating the
4 validity of the -- or the potential validity of the claim
5 with the amendment issue. But there's no dispute that the
6 list of securities that they didn't get back is the list of
7 securities they didn't get back, right?

8 MR. FAIL: We haven't analyzed whether -- we --
9 we're accepting for the sake of argument today that the list
10 of securities that they said they didn't get back when they
11 filed the claim is --

12 THE COURT: And when the claims process was
13 engaged they didn't hide that fact from you. They told you,
14 here's the securities we didn't get back.

15 MR. FAIL: Correct.

16 THE COURT: Right? So whether or not they
17 ultimately recover what they say they ought to recover with
18 respect to those securities, the number might be extremely
19 large. The number might be extremely small. So that seems
20 to me to be a backwards way of deciding whether or not to
21 allow the amendment, to try to guess what that might
22 ultimately be.

23 And in the -- just -- I'm just not understanding
24 --

25 MR. FAIL: The reason I brought it up, Your Honor,

1 is only for the reasonable notice if Mr. Stone -- if Mr.
2 Brilliant -- if Stonehill would suggest that we were on
3 notice that the claims dropped in value, the only value that
4 we had to start was \$890, and through discovery we learned
5 that they received \$86 million for that. So even when Mr.
6 -- when Stonehill produced discovery to --

7 THE COURT: I'm sorry. Could you say that
8 sentence one more time?

9 MR. FAIL: There were 54 securities on the claim.

10 THE COURT: Right.

11 MR. FAIL: Stonehill said that they were \$890,000.

12 THE COURT: Right.

13 MR. FAIL: In discovery and on the schedule
14 produced it -- we believe that that schedule says that for
15 those 54 securities the value when they were received back
16 was \$86 million approximately. And so if the debtors were
17 on notice of these claims and were to look at when the value
18 -- when the distribution was made back to the creditor, the
19 debtors would assume that they don't -- would have no
20 obligation to them, would have no further obligation to
21 Stonehill. The securities that they received back were
22 satisfied.

23 But Your Honor was correct. That isn't relevant
24 -- that isn't determinative here. What needs to be focused
25 on is whether the amendment -- an amendment here is proper

1 and whether there was notice. And we don't believe that
2 based on the general reservations of rights I don't -- we
3 don't believe that a reference to the prime brokerage
4 agreement or the relationship is anything specific. That is
5 as general a reservation of rights as one could get.

6 Stonehill says, I had a prime brokerage
7 relationship. I want everything under that prime brokerage
8 relationship. If that's the only contact and relationship
9 they have, then what is the difference between saying, I
10 reserve all rights to assert all different -- all other
11 claims. There's no difference. The only claims that you
12 could have are based on your relationship or contact.

13 And so referring back to a prime brokerage
14 agreement in a proof of claim was insufficient to convert a
15 general reservation into one that would put the creditor on
16 notice.

17 THE COURT: But you've just did -- you just did a
18 slight of hand. I mean, the general reservation would be a
19 proof of claim that says, this is a claim for every claim
20 that I have.

21 MR. FAIL: Right.

22 THE COURT: Right. But that's not what they did.
23 They filed a claim that says that the failure of LBI to
24 return claimant's cash and securities -- generally, it
25 doesn't say as listed in Schedule 2 -- constituted a breach

1 of the agreement. And the -- you know, in lots of words,
2 right, so if you were really looking to cut corners, which
3 lawyers don't tend to want to do, you know, you would have
4 just filed the proof of claim without an attachment and I --
5 I don't know what the rules were as to whether or not you
6 had to attach the prime brokerage agreement or not, or you
7 could just refer to it.

8 And then here it is, paragraph fourteen, it's not
9 just reservation of rights because I've always wondered
10 about this, right? Claimant reserves -- look at paragraph
11 sixteen, Claimant reserves all of its rights to supplement
12 or amend this claim in any and all respects. Well, that's
13 clearly not true. I mean, you could say that, right, but
14 that's not what the law -- you're not going to be allowed to
15 do that. So I would --

16 MR. FAIL: The case law says you can't do that.

17 THE COURT: Right. You can't do that. So every
18 lawyer does it. I was guilty of doing it. But I don't
19 really think it means anything.

20 On the other hand, paragraph fourteen where it
21 says that claimant is asserting the full amount of claims
22 arising under the PB agreement. I mean, that's a pretty
23 clear statement that, at least to me, that as of the time
24 that they filed this they weren't really putting it out
25 there in excruciating detail everything they had. But they

1 had stuff.

2 MR. FAIL: And they calculated it to the penny
3 with specificity with respect to others. And the only
4 question is, did they have -- that's one inquiry. One
5 inquiry is whether they had notice.

6 THE COURT: Right. But I think that I -- you
7 know, I think I have a considerable amount of discretion
8 here and I think that there -- I don't think that there's
9 any indication, frankly, on either side that, you know,
10 there was inequitable conduct. I don't think that this
11 really has the feel of, you know, a kind of five minutes to
12 midnight surprise claim that's upsetting the apple cart of
13 someone's plan.

14 I asked Mr. Brilliant the question, you know, why
15 didn't you do it earlier and I think his answer was rather
16 satisfactory; that in the way this particular claims process
17 played out, once issue was joined and things began to move
18 along they came up with the schedule and on they went.

19 So --

20 MR. FAIL: Your Honor --

21 THE COURT: -- look --

22 MR. FAIL: -- to that point.

23 THE COURT: Yeah.

24 MR. FAIL: The Seventh Circuit had a quote in a
25 decision that we quoted, (indiscernible) that says:

1 "If a creditor knows that after analyzing
2 information which is within -- wholly within its own
3 control, it may later seek to amend its claim dramatically.
4 It must not keep that knowledge secret. If it does so, and
5 later surprises the debtor or other creditors, it should not
6 be -- it should not claim surprise if the Bankruptcy Court
7 elects to deny the amendment."

8 Here, there was discussion with Stonehill about
9 other claims that was irrelevant. There was discovery
10 taken. But that is also irrelevant because as Mr. Stone --
11 the pleading -- the Stonehill's pleadings made clear, the
12 2012 discovery did not produce the schedule of claims that
13 add up to 153 million. That was only provided in November
14 of 2013 and in 2014 that was discussed. And that's just --
15 that's accepting what's in Stonehill's pleadings.

16 And so that was --

17 THE COURT: So what came out in discovery?

18 MR. FAIL: Discovery was served in -- to try to
19 find a basis for -- to find a basis for liability against
20 the 23 different debtors under the prime brokerage
21 agreement. But what wasn't produced was the full detail of
22 the securities that are listed here in the amounts and the
23 calculation of 153.

24 So it was a surprise. And, Your Honor, this isn't
25 an evidentiary hearing. But it was a surprise to the

1 debtors and the plan administrator that after -- there were
2 -- there were previous attempts before we were here today
3 which included requests for Stonehill to withdraw the claims
4 because we -- the plan administrator believed they were
5 deemed satisfied in full, all but an \$11 million piece which
6 is referenced and is the same in both the original and the
7 amended, but it hasn't been yet allowed by LBI. It wasn't
8 allowed as a customer claim. It's still to be determined if
9 it's a general unsecured claim.

10 So having been deemed satisfied, all other
11 creditors that had a prime brokerage relationship against --
12 with LBI yet asserted a claim against LBHI, I believe this
13 is the only claim or set of claims that's out there where
14 LBI was the only broker dealer in the Lehman family that was
15 involved with the creditor, and LBHI had claims in the other
16 28 states had claims filed against them that's still
17 outstanding.

18 LBHI took efforts to coordinate with Lehman
19 Brothers, Inc. to facilitate additional transfers of
20 securities in cash and believed that this -- these claims
21 would go away. At that point Lehman Brothers Holdings, Inc.
22 was surprised to find out that there were 154 other
23 securities or that there were 240 other securities and that
24 with respect to all of them there was a tremendous
25 diminution in value.

1 But --

2 THE COURT: So what's the -- but -- so a couple of
3 things.

4 One, then given the way you've described the --
5 kind of the feel, then there's no floodgates issue, right?
6 There's no --

7 MR. FAIL: That's not correct, Your Honor. I just
8 -- I respectfully disagree with that.

9 THE COURT: But you just said they're the only
10 ones.

11 MR. FAIL: With respect to --

12 THE COURT: So --

13 MR. FAIL: -- LBI only prime brokerage agreements,
14 yes.

15 THE COURT: Okay.

16 MR. FAIL: But there are 3,600 other claims that
17 are still outstanding, that are still -- that -- for which
18 -- I mean, the case law that we all cited for amendments of
19 claim don't deal with prime brokerage agreements and
20 diminution only.

21 THE COURT: Okay. So your floodgates argument is
22 just if I generally allow this amendment of re-filing, it's
23 going to open the floodgates on every single claim.

24 MR. FAIL: It's twofold. It's that and that's the
25 reasoning that the Court has previously disallowed 1,400

1 claims already as being late filed, and those were all filed
2 or asserted or -- asserted prior to November 2013 when
3 Stonehill first informed the debtors of this information.
4 So that's -- yes. It would apply equally --

5 THE COURT: Okay. But a late filed claim and an
6 amendment claim that relates back is two different things.

7 MR. FAIL: It's the flip side. If it doesn't
8 relate back, then it isn't an amendment and it is a late
9 claim. So it's the same analysis. You just reach a
10 different conclusion.

11 THE COURT: Okay. I don't see it that way, but we
12 don't have to agree on that.

13 MR. FAIL: Okay.

14 THE COURT: And what's your theory for why
15 Stonehill, you know, hung in the weeds? I mean, I just
16 don't -- I'm trying --

17 MR. FAIL: I don't understand it. We don't
18 understand it either, Your Honor. If it's true that 99.4
19 percent of the value of their portfolio was lost, we would
20 have thought it would have been claimed and specified in the
21 claim. It wasn't. So whether this is an attempt to
22 increase the claim amount under a new theory that they've --
23 that they've come up with, it's not for us to speculate.
24 The only reasonable conclusion that we could reached based
25 on looking at these claims is that it wasn't asserted.

1 THE COURT: Okay.

2 Mr. Brilliant.

3 MR. BRILLIANT: Yes, Your Honor.

4 THE COURT: So one more time, you gave me an
5 answer before as to why you didn't make this clearer
6 earlier. You want to go another round with me on that one.

7 MR. BRILLIANT: Sure. I think, Your Honor, the
8 real answer is they never asked until we got into
9 discussions -- let's just put this in the context of the
10 Lehman case here.

11 THE COURT: okay.

12 MR. BRILLIANT: I mean, you know, there are issues
13 going on with respect to LBI. We were negotiating with LBI,
14 getting back securities. We had certain claims allowed.
15 There were issues actually with respect to these debtors and
16 we reached agreements on certain things. We got certain
17 claims allowed.

18 With respect to the issue of this proof of claim,
19 their focus, as Mr. Fail was very upfront about, was not on
20 the amount of the claim. Their focus was whether or not in
21 an LBI only broker dealer whether or not on the terms --

22 THE COURT: Yeah.

23 MR. BRILLIANT: -- the face of the agreement where
24 it said they were all liable, you know, whether or not there
25 was joint and several liability and whether we had any

1 claims. That was their focus.

2 They never objected to our claim. As much as --
3 and again, Judge, I'm not trying to -- this is not about
4 jumping the line here. We wanted them to object to the
5 claims so that we could have a claims allowance process and
6 get our claim allowed. They didn't do that. A number of
7 other people came into court in front of Judge Peck and
8 asked for --

9 THE COURT: Well, they would say --

10 MR. BRILLIANT: -- that type of relief.

11 THE COURT: -- They would say --

12 MR. BRILLIANT: Didn't get it.

13 THE COURT: They would say they didn't do that
14 because who knew that you were going to assert a claim for
15 \$154 million.

16 MR. BRILLIANT: Right. But, again, we --

17 THE COURT: Right. So --

18 MR. BRILLIANT: Right.

19 THE COURT: Right. So we're kind of at a --

20 MR. BRILLIANT: Well --

21 THE COURT: -- you know, we're staring each other
22 down here.

23 MR. BRILLIANT: Look, you know, in the typical
24 case \$150 million is a lot of money. It's not in this case.
25 They were reserving for us, Your Honor, \$865 million --

1 THE COURT: Right. But that --

2 MR. BRILLIANT: -- for --

3 THE COURT: -- but that argument -- I'll tell you
4 right now. That argument of yours I don't buy.

5 MR. BRILLIANT: Okay.

6 THE COURT: The look how much better off we are.
7 It used to be 800 million and now it's only this amount. So
8 that's --

9 MR. BRILLIANT: Right.

10 THE COURT: -- neither here nor there.

11 MR. BRILLIANT: But I don't -- you know --

12 THE COURT: That's not actual money they don't
13 have to give out.

14 MR. BRILLIANT: Yeah. Okay. But the point is,
15 you know, you're saying like, well, you know, \$150 million,
16 why didn't you come in and affirmatively --

17 THE COURT: Yeah.

18 MR. BRILLIANT: -- do this, because we're not
19 required to. I mean, you know, people don't generally do
20 that. You file you proof of claim. If nothing comes up
21 under 3018, there's no issues with respect to reserve,
22 generally there's a deadline for the debtor to file an
23 objection in a reasonable period of time. Here, it was a
24 lengthy one and it got extended. And we are where we are.
25 They sought discovery from us. Again, they just wanted to

1 know how can you -- you know, our sense of that was they --
2 it really had less to do with us. They just wanted to
3 understand what our theory was as to why there was joint and
4 several liability. So that their -- you know, their
5 discovery was --

6 THE COURT: So, in essence, they -- you know, that
7 -- in that round of discovery they asked the wrong question
8 and you didn't supply them with the right answer.

9 MR. BRILLIANT: Right. And then when they -- as
10 Mr. Fail said, when they asked us to -- when LBI distributed
11 securities to us and wrapped up --

12 THE COURT: Right.

13 MR. BRILLIANT: -- the vast majority of their case
14 and paid out the vast majority of their claims, they came to
15 us and said, we would like you to withdraw your claims. And
16 we said, whoa, what are you talking about. The unliquidated
17 portion of our claim is \$153 million and we sent them the
18 chart.

19 Now one thing, it's a really small point and it's
20 kind of irrelevant in many respects, but I think it's
21 important that Your Honor understand, you know, Mr. Fail
22 says, well, you know, they give you just the amount they
23 lost. They probably had some -- it increased in value
24 during that period of time.

25 If you look at the schedule, there are positives

1 and negatives, and they're netted out. We gave the debtors
2 the benefit of the doubt. You know, I don't -- that goes to
3 the ultimate --

4 THE COURT: Right.

5 MR. BRILLIANT: -- amount of the claim.

6 THE COURT: Right.

7 MR. BRILLIANT: But we were not trying to be
8 unfair here and just say, well, if something you held
9 increased in value, you know, that's to our benefit. But
10 anything you held and we lost value that, you know, you have
11 to pay us for that. So we did net it out.

12 But the issue is, Your Honor, they had a lot of
13 opportunities here, you know, to figure this out and they
14 could have asked. I mean, they could have asked in the
15 discovery, tell us what the unliquidated portion is. But --
16 and this idea here that a debtor can read a proof of claim
17 and say there's liquidated and there's unliquidated
18 portions. In the face of the claim it says not less than.
19 So you -- you know, and it says unliquidated amounts. How
20 one could understand --

21 THE COURT: Well, but they get -- Mr. Fail gave a
22 view that was that that -- that the unliquidated really
23 referred to what you had put in with the other -- with the
24 bullet points related to the 23 million.

25 But, look --

1 MR. BRILLIANT: Yeah. But that's --

2 THE COURT: -- I think that we could spend a
3 significant amount more time and everybody could think to
4 themselves or say out loud, you know, woulda, shoulda,
5 coulda, had I had everyone had an opportunity things would
6 have been done differently on both sides.

7 I don't think that there's a floodgate situation
8 here. I don't think that I'm going to have a thousand
9 people showing up with late claims. I don't think Judge
10 Peck allowed possibly even one claim amendment. I think
11 this is a pretty unique set of facts and circumstances.

12 I think I have considerable discretion and I
13 think there -- while there are certainly equities on both
14 sides, given my reading of the proof of claim, I think the
15 tie goes to the runner here. And that means that the claim
16 can be amended or re-filed. I really am indifferent as to
17 --

18 MR. BRILLIANT: Thank you, Your Honor.

19 THE COURT: -- how you characterize that. And
20 what I would ask, though, is that you work with Mr. Fail to
21 characterize it in a way that makes it very, very clear that
22 this is a very unique, generic set of circumstances to
23 address any concern that Lehman has that this is an open
24 invitation, open season to invite a lot more claims because
25 we have plenty of claims to deal with already.

1 MR. FAIL: Your Honor, may I just add one more
2 point before we conclude this matter?

3 To the extent that what Stonehill is now doing is
4 liquidating the unliquidated portion and that's --

5 THE COURT: Well --

6 MR. FAIL: -- what Your Honor --

7 THE COURT: -- I don't think they're liquidating
8 it. They're amending the claim to --

9 MR. FAIL: To add an unliquidated -- what was
10 formally unliquidated.

11 THE COURT: They're amending the claim to add
12 claims with respect to these securities. This is -- I'm not
13 allowing -- to be clear, I'm not allowing the claim.

14 MR. FAIL: Understood, Your Honor. I was going to
15 clarify that for -- with respect to the 240 claims that were
16 returned, 101 -- roughly 101 million out of the \$153 million
17 that they're claiming now was returned, according to Mr.
18 Brilliant, nine months before they filed this claim. That
19 was a liquidated -- that could have been as liquidated as
20 the 890. It's the other side of the -- it's the other
21 portion of the claims.

22 So to the extent that there's an addition of
23 claims, I would respectfully request that you limit it to
24 the portion that perhaps they couldn't have calculated.
25 They certainly could have told us the beginning date value,

1 but not the full 153. So do a carve-out to make it only
2 whatever the difference is with respect to the securities
3 that were listed on the claim.

4 THE COURT: That seems kind of reasonable, Mr.
5 Brilliant.

6 MR. BRILLIANT: Yeah. Your Honor, it doesn't. I
7 mean, what they're really asking Your Honor to do is decide
8 without any kind of record here that it wasn't -- it wasn't
9 -- it was easily ascertainable to have the amounts for all
10 the stuff that we've already received.

11 THE COURT: Look, I mean, I think I -- they're
12 going to re-file the claim. They're going to amend the
13 claim and if you want to make that argument at the allowance
14 phase, you can make it then. I don't know -- I feel like
15 this is turning into a hearing on the allowance of the claim
16 and that's not what I'm doing.

17 MR. FAIL: No, Your Honor. I apologize if I
18 wasn't clear. I was trying to limit what claims could be
19 asserted to only the securities that were listed. So a
20 diminution for the 54 securities that were asserted on the
21 claim rather than the 240 other ones and the split, I
22 believe, would be 100 and 50.

23 THE COURT: No. He gets to file a claim for
24 diminution of all the securities that weren't returned.
25 That's my ruling.

1 MR. FAIL: Thank you.

2 THE COURT: All right.

3 MR. BRILLIANT: Thank you, Your Honor.

4 THE COURT: Okay.

5 Okay. Before we get to Mr. Tolin, if you wouldn't
6 just give me 30 seconds to deal with a scheduling matter in
7 another case.

8 MR. FAIL: Your Honor, may we be excused?

9 THE COURT: Yes. Thank you very much.

10 MR. FAIL: Thank you, Your Honor.

11 MR. BRILLIANT: Thank you, Your Honor.

12 (Pause)

13 THE COURT: How are you?

14 UNIDENTIFIED SPEAKER: Well, Your Honor. How are
15 you?

16 THE COURT: I'm okay.

17 UNIDENTIFIED SPEAKER: Good.

18 THE COURT: It gets to be a long day.

19 UNIDENTIFIED SPEAKER: Yeah. No kidding.

20 THE COURT: That's all right.

21 All right. So this is objection to proof of claim
22 number 33514 filed by Frank Tolin, Jr.

23 MR. TOLIN: Yes, ma'am.

24 THE COURT: You're Mr. Tolin?

25 MR. TOLIN: Yes, ma'am.

1 THE COURT: How are you, sir?

2 MR. TOLIN: I'm doing fine. How are you?

3 THE COURT: Welcome to our court.

4 MR. TOLIN: Thank you.

5 UNIDENTIFIED SPEAKER: How would you like to
6 proceed, Your Honor?

7 THE COURT: Well, I've read everything and I'll be
8 pretty honest. I'll be totally honest, actually, Mr. Tolin.
9 I'm not seeing a claim here. There's no relationship
10 between, frankly, what happened to you for which I'm sorry
11 and any liability by any Lehman entity. You signed on for a
12 mortgage. You didn't get the rate that you said someone
13 told you you were going to get and then the person that you
14 dealt with, Ms. Washington, turned out to not do some nice
15 things. And that has absolutely nothing to do with BNC.
16 There is no -- there's no nexus. There's no possible nexus
17 at about five different levels. The responsibility for any
18 damage that you suffered is not remotely near BNC.

19 You entered into this loan agreement knowing that
20 the interest rate was 9.6 instead of 5.5. You then -- you
21 needed the cash. I understand that. And then these
22 unfortunate things happened with Ms. Washington and nothing
23 having to do with your dealings with Ms. Washington or the
24 Borden (ph) firm really can be tied back to BNC in any way.

25 So I just -- I tried very hard to see things from

1 your perspective, but I think the fact is and the conclusion
2 has to be that, you know, you entered into the loan
3 agreement. You were fully aware of what the terms were.
4 Ms. Washington was not BNC's agent and you really haven't
5 made any sort of a prima facie showing that she was. And
6 BNC did not, you know, aid and abet or assist Ms. Washington
7 in making whatever representations she made to you with
8 respect to the rate, and certainly there's not even an
9 allegation that BNC had anything to do with the -- you know,
10 the subsequent events with the payment of her commission or
11 the additional loan or whatever.

12 So I'm sorry that that happened to you, but it's
13 really not something that BNC can be held responsible for.

14 I'm happy to hear you try to persuade me
15 otherwise. But I fully prepare before I come out here, but
16 I do -- do not want to deprive you an opportunity to tell me
17 something I might have missed.

18 MR. TOLIN: Thank you very much, ma'am.

19 Would you like me to approach?

20 THE COURT: Sure.

21 MR. TOLIN: Okay. Thank you.

22 Well, as you know, I'm Frank Tolin, Jr. and I'm
23 representing myself pro se.

24 First, my position is that Patricia Washington did
25 act as the agent for BNC. So typically the bank's agent

1 disburses funds during a refinance. Patricia Washington
2 disbursed those funds to me. You know, so she go the funds
3 from the bank's agent -- from the bank's attorney. Behind
4 closed doors, whatever they did they did. She brought the
5 funds to me. She did all the work.

6 Now the other thing is I found documents that
7 indicate that at some point she was to be paid a yield
8 spread premium by the bank. So if she's going to be paid by
9 the bank and by me, then there's a conflict of interest from
10 the outset. Okay. Towards the very end, they didn't pay
11 her a yield spread premium, but that does not mean there was
12 a -- was not a conflict and that she was expecting to be
13 paid by BNC mere days before the closing.

14 So, yes. My position is still that she was the
15 agent for BNC. I do have some exhibits here that do
16 indicate that she was to be paid a yield spread premium. I
17 did obtain documents from the New York State banking
18 authority filed by Gordon, Gordon & Gordon indicating that
19 typically they do get paid a yield spread premium.

20 THE COURT: But I don't understand what that has
21 to do with the fact that you voluntarily entered into this
22 loan and there was a delta between what you thought you were
23 going to get and what the loan actually was. I mean, you're
24 not -- your claim is not that you thought you were signing a
25 loan that had a 5.5 percent interest rate. You knew you

1 were --

2 MR. TOLIN: No. That's --

3 THE COURT: -- taking out a loan for 9.6 percent,
4 right?

5 MR. TOLIN: I knew when I showed up at the
6 closing. But what --

7 THE COURT: But you didn't have to sign, Mr.
8 Tolin.

9 MR. TOLIN: Well, yes and no, ma'am. And may I
10 give you an example?

11 THE COURT: Sure.

12 MR. TOLIN: Okay. First, and I've told this to
13 Mr. Rollin before; that if someone say for instance knows
14 that you don't eat a certain type of food and then they
15 starve you and drag it out, and then offer you that piece of
16 food, then you go ahead and you eat it, but it's not
17 necessarily that you ate it of your own free will. They've
18 starved it and dragged it out.

19 And that's what occurred here. So she dragged the
20 process out for three months. In the meantime --

21 THE COURT: She may well have done that, but you
22 --

23 MR. TOLIN: Yes.

24 THE COURT: -- you -- there are no allegations and
25 there's no proof, prima facie or otherwise --

1 MR. TOLIN: Yes, ma'am.

2 THE COURT: -- that BNC was the driver behind
3 that.

4 The other thing that is inexplicable is that
5 you're asking for a million dollars.

6 MR. TOLIN: Well, first it's recession of the
7 loan, reimbursement for all monies paid, legal fees. I've
8 incurred over \$30,000 in legal fees, and then whatever
9 damages --

10 THE COURT: Well, I think you have to ask Ms.
11 Washington -- I think you have to try to recover those, if
12 anybody, from Ms. Washington.

13 MR. TOLIN: She's in the wind.

14 THE COURT: Well, that --

15 MR. TOLIN: You know --

16 THE COURT: But that speaks volumes as to why
17 there's a million dollar claim that's filed against Lehman
18 because Lehman is many things, but it's not in the wind. I
19 mean, Lehman is here. Lehman has money to give out.

20 But, you know, the plan administrator as a
21 fiduciary, I think, has done a very thorough job of
22 establishing that this was an unfortunate situation, but
23 that your own deposition testimony has supported the
24 conclusion that, you know, there was no fraud here. You
25 knew what the loan terms were. And that there were no --

1 there were no representations that could lead anybody to
2 believe that BNC might be responsible for Ms. Washington's
3 actions. And, you know, it does bear pointing out some of
4 the details surrounding what happened.

5 I mean, you knew Ms. Washington for 12 years.

6 MR. TOLIN: Yes, I did, but I didn't know she was
7 a con artist. I had no idea. And, you know, as a matter of
8 fact, she's very good and someone else who was conned by her
9 is here in court and he's worse off than I am, you know,
10 believe it or not. I was able to track down several
11 individuals. And, you know, it's -- she's very good. You
12 would have no idea. And the --

13 THE COURT: Well, I don't have any reason to doubt
14 that nor do I have any basis on which to agree with it.

15 MR. TOLIN: Okay.

16 THE COURT: But in any event, there's nothing in
17 your claim that gives me a basis on which I can hold BNC
18 responsible for what Ms. Washington --

19 MR. TOLIN: I understand.

20 THE COURT: -- did to you or others which is most
21 unfortunate.

22 MR. TOLIN: Heinous. Yes, it is.

23 THE COURT: And I would suggest to you that if, in
24 fact, she did what you say that she did, you might wish to
25 alert the local authorities --

1 MR. TOLIN: I've done that already.

2 THE COURT: -- and try to get them interested in
3 this person. They have a way of --

4 MR. TOLIN: I've done that.

5 THE COURT: -- of finding people. But, Mr. Tolin
6 --

7 THE COURT: I understand your position.

8 THE COURT: -- unfortunately, I cannot allow your
9 --

10 MR. TOLIN: I understand that, ma'am. And you
11 know what? I have contacted the FBI as well as the Queens
12 County District Attorney's Office and this is years ago
13 regarding this matter. I believe he has contacted some
14 authorities also.

15 There's a couple of things that I just want to
16 point out.

17 THE COURT: Sure.

18 MR. TOLIN: There are some misinterpretations
19 regarding the deposition testimony. At no point did I know
20 that she was unethical and I only found that out months
21 after the closing.

22 Second, and, you know, nothing against Mr. Mesedey
23 (ph) but some of the allegations he made was that there were
24 unclean hands on my part. There were no unclean hands.

25 THE COURT: I really don't even -- I don't --

1 MR. TOLIN: I understand, ma'am. But --

2 THE COURT: I frankly don't even get to that --

3 MR. TOLIN: But --

4 THE COURT: -- issue.

5 MR. TOLIN: But I'm just telling you now that it's
6 part of the record --

7 THE COURT: Sure.

8 MR. TOLIN: -- I mean, if someone does a search
9 then, you know, that's something I have to deal with. But
10 out of principal, you know, I've been fighting since 2005
11 and that's the only reason I've hung in there and done it.
12 You know, when I did sell the property, which I really
13 didn't want to do, they found out that there really wasn't
14 any -- the mortgage hadn't been recorded. So they went to
15 go pay me and I stopped the closing and said, wait a minute.
16 There's an outstanding mortgage.

17 So we stopped the closing, contacted the company,
18 and the company went ahead and, you know, sent us the payoff
19 letter. I went ahead, had those funds disbursed to them.

20 Now after I did that, can I at least have the
21 money that I paid you guys for the recording, which was who
22 BNC hired. They offered me \$42 after I paid them over
23 5,000.

24 So even though you're saying that there's no
25 nexus, I have those checks here, proof of payment. Can you

1 at least get me --

2 THE COURT: How much were -- so you -- you're
3 saying you were a good Samaritan with respect to the lack of
4 recordation of the mortgage?

5 MR. TOLIN: That's right. It was 158,000 and
6 change that --

7 THE COURT: Right.

8 MR. TOLIN: -- I had cut a check to them.

9 THE COURT: And what were your costs that you
10 incurred in connection once you alerted them to that issue?

11 MR. TOLIN: Well, once I alerted them to that
12 issue, I stayed here in New York, but prior to then I still
13 paid them for the refinance 5,000 and change, and then to
14 sell the property because their mortgage hadn't been
15 recorded, there was a lapse in the title. So now I have to
16 track down the person who I bought the property from 20
17 years ago and then get him to go ahead and resign the
18 documents because any record that they could find that
19 notary signatures and it's all stale.

20 So, coincidentally, he happened to be in another
21 part of Texas, so I tracked him down, got the documents, got
22 him to sign them, notarize them, set them in and I was able
23 to sell the home.

24 But in terms of my out of pocket, I can't put a
25 calculation on the time and effort to track this person

1 down, but I do have those checks that were disbursed to pay
2 the company that they hired to go ahead and record the
3 title. And --

4 THE COURT: How much was the amount of those?

5 MR. TOLIN: It's 5,000 and change. I have a copy
6 for the Court.

7 (Pause)

8 MR. TOLIN: Mr. Rollins, would you like a copy?

9 MR. ROLLIN: Oh, sure.

10 MR. TOLIN: And I had given a copy of that
11 already.

12 THE COURT: Is there a --

13 MR. TOLIN: Permission to approach, Your Honor.

14 THE COURT: Sure. Just trying to -- thinking of
15 --

16 MR. TOLIN: Coincidentally, the attorney who
17 handled the sale of this property was also the same attorney
18 who handled the refinance back in 2005.

19 THE COURT: I'm just trying to find your proof of
20 claim.

21 Mr. Rollin, is it in -- is it attached to one of
22 the pleadings?

23 MR. TOLIN: The proof of claim for the check?

24 THE COURT: No. Your -- your claim generally?

25 MR. ROLLIN: I'll look through it, Your Honor, and

1 tell you right away. I have a proof of claim here and I
2 probably have an extra copy if it will help, Your Honor.

3 MR. TOLIN: I have a copy, but I don't have an
4 extra copy, Your Honor.

5 THE COURT: Just it doesn't seem to be in the
6 materials that --

7 MR. TOLIN: Well, it's -- it's not -- it may not
8 be in the materials because I only found out that the
9 mortgage was not recorded when I tried to sell the property.
10 However, I do have a document that says that BNC knew that
11 the mortgage was not recorded.

12 THE COURT: Well, I'm asking a different -- all
13 I'm trying to find out is the claim is for a million
14 dollars.

15 MR. TOLIN: Yes, ma'am.

16 THE COURT: That's a round number. All I'm trying
17 to figure out is if, in fact, you provided -- you went out
18 of pocket in this way that somehow provided something of
19 value directly to BNC. I'm willing to find a way to
20 consider that as a claim. That's all I'm talking about.

21 MR. TOLIN: Okay.

22 THE COURT: But I don't -- I'm not finding
23 anything in the packet that I have before me that helps me
24 figure out whether or not there's a place holder for these
25 amounts that you've handed me, which total about \$5,200.

1 So --

2 MR. TOLIN: What about legal fees?

3 THE COURT: I'm sorry.

4 MR. TOLIN: What about legal fees?

5 THE COURT: Don't push your luck, Mr. Tolin.

6 MR. TOLIN: I was trying.

7 (Laughter)

8 THE COURT: Would you -- could I impose on you to
9 take a look at this and see if there's a way or a basis for
10 considering those 5,200 of out of pockets because it seems
11 to me that if a value was provided directly to BNC, that
12 that's something that ought to be considered.

13 But I do stand by my earlier statement --

14 MR. TOLIN: I understand, Your Honor.

15 THE COURT: -- that with respect to the
16 overarching claim, I'm finding that there is no basis --

17 MR. TOLIN: I understand.

18 THE COURT: -- for that claim.

19 So why don't I ask you to talk to each other. I'm
20 going to hand these pieces of paper back to you and you can
21 work together to submit an appropriate order to me and I'm
22 going to move onto the next --

23 MR. TOLIN: That's your copy if you would like,
24 Your Honor.

25 THE COURT: No. I --

1 MR. TOLIN: Okay.

2 THE COURT: I should only take things that are
3 filed on the docket. You know that. It was delightful to
4 talk to you today, Mr. Tolin.

5 MR. TOLIN: My pleasure, ma'am. Thank you very
6 much.

7 THE COURT: All right.

8 MR. TOLIN: You all have a --

9 THE COURT: Thank you.

10 Okay. The final matter is a pretrial conference
11 in LBSF versus FHLB.

12 Did you have an expectation that this would be on
13 or off the record?

14 MR. TAMBE: We're happy either way, Your Honor.

15 THE COURT: Okay.

16 MR. TAMBE: It's really just scheduling matters
17 because we want to --

18 THE COURT: Right. Okay.

19 Hello, Mr. Bienenstock. How are you?

20 MR. BIENENSTOCK: Good afternoon, Your Honor. How
21 are you?

22 THE COURT: Good.

23 MR. TAMBE: Since this is our first time here, I
24 have some materials for background so you have some context
25 of what the parties --

1 THE COURT: I'm sorry.

2 MR. TAMBE: I have some materials for background.
3 This is our first time before Your Honor.

4 THE COURT: Okay.

5 MR. TAMBE: If I could just hand up --

6 MR. BIENENSTOCK: We haven't seen this, Your
7 Honor.

8 MR. TAMBE: It's nothing new.

9 May I approach, Your Honor?

10 THE COURT: Yes.

11 (Pause)

12 MR. TAMBE: It's an adversary proceeding, Your
13 Honor.

14 THE COURT: Right.

15 MR. TAMBE: LBSF against FHLB Cincinnati. It has
16 to do with a termination of a ISDA master agreement. The
17 basic facts are on slide 2. The bankruptcy occurs at 1:45
18 a.m. This ISDA master agreement, unlike the vast majority,
19 doesn't have optional early termination. It has something
20 called automatic early termination. And so there's a
21 provision written into the contract that says if you file a
22 petition for bankruptcy, the parties agree that the
23 agreement is terminated as of the time immediately
24 proceeding. And that's an issue in dispute in this case.

25 On the 15th itself we get a letter from FHLB

1 saying there has been early termination. The next day they
2 enter into a replacement transaction or a series of
3 replacement transaction. So what they had with Lehman right
4 before Lehman's bankruptcy were 90 plus different swaps all
5 under the same master agreement.

6 THE COURT: Uh-huh.

7 MR. TAMBE: On the 16th, according to their
8 statements, their public filings, they entered into
9 replacement transactions for all of those. They replaced
10 the entire risk with the same terms, same economic
11 conditions.

12 And the result of those replacement transactions
13 were such that they received a gain. They received a gain
14 of \$70 plus million. We have the calculations on page 10.
15 The parties had agreed if there's a gain on early
16 termination to something called second method. Now what
17 second method means under the ISDA master agreement, unlike,
18 again, the vast majority of common law contracts, a
19 defaulting party gets the benefit of the bargain.

20 Now contracts 101 is if you're the breaching party
21 you lose your rights under the contract. The second method
22 says, no, no, different rule for these kinds of derivatives.
23 If you're in the money, you get the money. They didn't turn
24 over to us the gain they enjoyed from replacing the risk.

25 If you go back to the time line what really

1 happens is they terminate us on the 15th. They replace on
2 the 16th. Nine days later they sent us a calculation
3 statement saying, we've replaced. We owe you some money.
4 Here's what we owe you. We find out from the public filings
5 later on that really what they had gained was far in excess
6 of what they paid to Lehman. And so this dispute ensues.

7 We've been through mediation. Mediation was
8 unsuccessful. We filed the adversary proceeding.

9 So let's go to the contract language, page 5.
10 There are two aspects of the contract language that we
11 believe are amenable to summary adjudication and that's one
12 of the issues that I think we're going to end up talking
13 about is --

14 THE COURT: But this --

15 MR. TAMBE: Yeah --

16 THE COURT: You know, not -- I don't want to cut
17 you short, but I am going to cut you short a little bit --

18 MR. TAMBE: That's fine, Your Honor.

19 THE COURT: -- because it just seems to me that we
20 ought to figure out a way that this all gets done at once.
21 I just want to do this once. I don't want to do it twice
22 and the way it's set up now there's even a specter of my
23 doing it three times, let alone with whatever trips people
24 are going to want to take to the District Court. And it
25 just seems to me that this summary judgment with respect to

1 termination and motion to dismiss, that we should just do
2 this once and that it does not make sense really to spin out
3 -- it's one dispute. It's a dispute over what these words
4 mean.

5 So why should we be spinning this out into
6 declaratory relief and motions to dismiss when, really, I
7 think, in essence, what you're saying to me maybe is it's
8 just cross-motions for summary judgment. Why isn't it just
9 that?

10 MR. TAMBE: The problem is it's not that because
11 there is -- there are two issues here. There are what we
12 call the purely legal issues and there are factual issues.
13 The overarching factual issue which we are not seeking
14 summary judgment on is when you finally figure out when you
15 are supposed to value these --

16 THE COURT: Right.

17 MR. TAMBE: -- how do you do that valuation?

18 THE COURT: Sure.

19 MR. TAMBE: What do you do? And that may well be
20 a battle of the experts.

21 But the threshold question is when should anyone
22 be permitted to value these contracts? Should you be
23 permitted to value these contracts as of the date that
24 precedes the early termination date because that just
25 increases the scope of the possible factual issues that can

1 be raised. We can narrow that factual dispute significantly
2 if we say, as we're going to ask the Court to say, September
3 15th is the early --

4 THE COURT: But that's -- but it -- but that's
5 piecemeal. That's -- it's not different than any other case
6 in which you can identify those types of issues and say,
7 give us a declaration to that effect on this piece of it.
8 It is setting me up for a series of piecemeal
9 determinations.

10 MR. TAMBE: Your Honor, I don't disagree that
11 we're asking for piecemeal, and I don't want to say
12 piecemeal is a bad word here. And here's why. We think it
13 actually will increase the efficiency because we'll then
14 know what the playground is, where the experts are going to
15 provide their opinions, what's the scope of what the
16 valuations could be.

17 One of the rulings we're asking for is a ruling
18 that predates the early termination date, a valuation that
19 predates the early termination date. It's simply off the
20 tables. You can't do that. And that's the valuation that
21 they're relying on right now. They're relying on a
22 valuation as of September 12th. September 15th, in our
23 view, was the early termination date. That valuation is
24 completely off the table. That tells us what --

25 THE COURT: But --

1 MR. TAMBE: -- we're going to be talking about.

2 THE COURT: But you're getting to the merits and
3 I'm trying to stick with the procedure. And what I see is
4 the specter of a -- in every case where I've got, you know,
5 a breach of contract action that I then am going to have,
6 you know, pregame show in which I'm going to give these
7 little mini-opinions on meanings of particular phrases. And
8 that's not helpful to me. It may be the way you want to do
9 it, but it sets me up for doing things multiple times and
10 creating inefficiencies when I think I -- we should find a
11 way to do this once, or at most twice.

12 MR. TAMBE: Right. And I think what we're
13 proposing would be, at most, twice because the way we see it
14 is you have these threshold issues right now, which is
15 what's the early termination date and can you value prior to
16 the early termination date.

17 THE COURT: But you're -- again, I -- maybe it's
18 getting late in the day so I'm not being articulate. But
19 you're plucking out phrases in a contract and saying, before
20 we get to the main event, give us a ruling on these
21 particular phrases. And that's just not -- that's not
22 attractive to me as a way of proceeding.

23 MR. TAMBE: Let me tell you why we thought it
24 might be attractive and --

25 THE COURT: Okay.

1 MR. TAMBE: -- certainly it's attractive from our
2 perspective.

3 We could see that there could be a difference of
4 opinion, and we're going to have competing experts valuing
5 this on the 15th.

6 THE COURT: Right.

7 MR. TAMBE: They have their views as to what the
8 proper value should be on the 15th. That, in our view, is a
9 much narrower range of disagreement than would exist if you
10 said it can go as far as back as the 12th and as far forward
11 as some other date. It's a much broader range.

12 We hope, because we've been through mediation,
13 that if there's a ruling on that issue and if we're
14 successful -- we're not prejudging that. Obviously that's a
15 decision Your Honor will make -- it might actually narrow
16 the dispute both factually, but also in terms of what's
17 possible in terms of resolution. That's why we identified
18 those as declaratory relief counts in the complaint. I
19 think we're pretty transparent about where we were headed
20 with the way the complaint was drafted.

21 And that's why we think summary judgment is
22 appropriate on those two discreet issues, which really are
23 plain language of the contract and nothing more than that.

24 THE COURT: Okay. Let -- when you say it that
25 way, it doesn't sound so problematic. But let me hear from

1 Mr. Bienenstock.

2 MR. TAMBE: Sure.

3 MR. BIENENSTOCK: Thank you. Good afternoon, Your
4 Honor. Martin Bienenstock of Proskauer Rose, LLP for
5 Federal Home Loan Bank of Cincinnati.

6 There is a way to do what you want, Your Honor,
7 and I will start with the solution and there are there just
8 a few things I would like to respond to.

9 THE COURT: Okay.

10 MR. BIENENSTOCK: By the way, did we decide that
11 this is on or off the record?

12 THE COURT: It's on the record.

13 MR. BIENENSTOCK: Okay. So I do want to respond
14 to a few things, but I want to get to the solution and the
15 bottom line first.

16 The Federal Home Loan bank of Cincinnati has the
17 same goal of the Court, let's do it once, if at all
18 possible. And Your Honor mentioned why do we need summary
19 judgment or motion to dismiss. We can accommodate that
20 because we don't think Your Honor needs to address our
21 motion to dismiss or their summary judgment motion if Your
22 Honor simply tells us to agree on discovery. Then, as Your
23 Honor contemplated, maybe the parties make cross-motions for
24 summary judgments, maybe we just have a trial. We're
25 prepared to do that. That's the simple -- that's the way it

1 should be done. I feel like saying, why don't we just agree
2 on that and go home.

3 The solution that --

4 THE COURT: What about the point that I think has
5 some merit of that to the extent that there are -- I'm not
6 arguing against myself, but these threshold or --

7 MR. BIENENSTOCK: That was my next point.

8 THE COURT: -- isolated legal issues, why do we
9 need to roll into discovery in -- on this time frame when it
10 might be this time frame or this time frame?

11 MR. BIENENSTOCK: Exactly. And the answer is
12 because the two points for starters that LBSF is saying is
13 going to lead to that narrower scope of possible resolutions
14 are not the points we think will. They could get both of
15 the rulings they're asking for. We don't interpret the
16 contract or all the facts in the transaction to lead to the
17 conclusions that they do.

18 So if Your Honor wants to pick out, wants to
19 decide things to narrow the scope, they'll have their list.
20 We'll have our list. If Your Honor wants to decide whose
21 list is right, well, then we're into the whole thing.
22 That's why the LBSF solution doesn't work, plain and simple.

23 Now what I wanted to respond to --

24 THE COURT: But give me -- give me -- I mean,
25 there's going to have to be a game plan where we don't have

1 a out of control amount of discovery, where we're not --

2 MR. BIENENSTOCK: Right.

3 THE COURT: -- looking at whatever the methodology
4 is here. You know, tens of thousands of transactions in
5 order to determine, you know, what the right calculation was
6 and what the right bids were and all of those kinds of
7 events.

8 So it -- I don't want this -- in the name of
9 efficiency, I don't want this to then become more of a
10 monster than it is.

11 MR. BIENENSTOCK: Well, we agree and, in fact, in
12 the mediation that was not successful my understanding is
13 LBSF already got a lot of stuff from us. I don't think we
14 got anything from them. But I don't know at this point that
15 I would expect either side to be unreasonable in the
16 discovery. And --

17 THE COURT: Well, let me -- so let's go there. So
18 they got a lot of stuff from you already.

19 MR. BIENENSTOCK: Yeah. Yes.

20 THE COURT: Okay. And given the nature of the
21 dispute, what would it be that you would be asking from
22 them?

23 MR. BIENENSTOCK: Well, I can't give Your Honor a
24 complete answer without consulting with my colleagues who
25 are here from Cincinnati --

1 THE COURT: Right.

2 MR. BIENENSTOCK: -- but we certainly want to see
3 --

4 THE COURT: How they acted in similar situations.

5 MR. BIENENSTOCK: Exactly. Exactly.

6 THE COURT: Well, this is an issue that is --
7 that's coming up in a lot of different places and I'm not
8 sure that -- I don't know about that.

9 MR. BIENENSTOCK: Well, okay. I do want to alert
10 Your Honor to something -- maybe I'm not alerting Your
11 Honor. Maybe Your Honor knows already. But the way Lehman
12 has dealt with the overall case and the tactics, it has
13 everybody's information, all of its counter --

14 THE COURT: I under --

15 MR. BIENENSTOCK: -- the counterparties don't have
16 Lehman's information.

17 THE COURT: I understand that.

18 MR. BIENENSTOCK: The playing field is not level.
19 It's very unfair to the claimant. And we don't want an
20 unfair playing field. But -- and if we can't get things
21 directly from Lehman, that doesn't mean there aren't other
22 ways, but they're a lot more time consuming and expensive.

23 THE COURT: Right. No. I appreciate the point
24 and it's certainly not fair for any party to, you know, take
25 the position that the way one party acted is not fair and

1 reasonable when, in fact, in another context they might have
2 done that. But, you know, litigation is litigation. And
3 parties take positions in different contexts that may be at
4 odds and that doesn't necessarily mean that that should be a
5 driver of a result in a particular situation.

6 MR. BIENENSTOCK: Well, okay. But to help Your
7 Honor get to the right result on what we should be entitled
8 to, I think the safe thing to go by is the rules. Things
9 calculated to lead to the --

10 THE COURT: Agree. Can't --

11 MR. BIENENSTOCK: -- discovery of --

12 THE COURT: -- disagree with that.

13 MR. BIENENSTOCK: -- admissible evidence.

14 THE COURT: Right.

15 MR. BIENENSTOCK: And if we -- right now it sounds
16 to me like they may or may not have a plain meaning of the
17 contract that they think Your Honor should buy. I'm not
18 sure because they're talking about a fact issue.

19 We do have a --

20 THE COURT: No, but they are -- they're urging me
21 that that's what they want on the declaratory relief. They
22 want me to --

23 MR. BIENENSTOCK: Oh, just on a few parts.

24 THE COURT: Right.

25 MR. BIENENSTOCK: Right. I don't know if --

1 THE COURT: Right.

2 MR. BIENENSTOCK: -- if they're saying there's no
3 part of the contract that's ambiguous or not and I don't
4 need to find out at the moment. But I can say they may say
5 that all parts of their contract are -- of the contract are
6 -- have a plain meaning. We may well say they have a plain
7 meaning, but different from the one they have in mind. And
8 if Your Honor determines either based on listening to the
9 two of us or based on the Paragren case where a district
10 judge in this district recently said the very words we're
11 arguing over in the contract were ambiguous, there's going
12 to be evidence taken and the -- what we want in discovery is
13 what would clearly be admissible evidence of that, which is
14 how they've interpreted --

15 THE COURT: Right.

16 MR. BIENENSTOCK: -- that in the past.

17 THE COURT: No. I mean, I think that there's a --

18 MR. BIENENSTOCK: We don't have to go overboard,
19 but --

20 THE COURT: Right.

21 MR. BIENENSTOCK: Okay.

22 THE COURT: No. I think that there's a reasonable
23 possibility of that and I think that we should go down the
24 path of doing this once.

25 MR. TAMBE: If I could just respond briefly, Your

1 Honor.

2 MR. BIENENSTOCK: Oh, may I finish first?

3 THE COURT: Yeah. Go ahead.

4 MR. BIENENSTOCK: Two things, Your Honor. The
5 letter that LBSF submitted yesterday is really a piece of
6 work and I don't want to go through it minutely, but I do
7 want to point out two things because I think it speaks
8 volumes about what the Court should be crediting and not.

9 We had made a point in our motion to dismiss that
10 the law in this district and generally is unanimous and firm
11 that when you have a cause of action you can't multiply it
12 into multiple causes of action by asking for declaratory
13 judgment on every fact within it. And the LBSF letter cites
14 this Enzo-Biochem (ph) case as if this contradicts our
15 statement that in this district the authorities are
16 unanimous in our favor.

17 And they say that, look at this, a motion to
18 dismiss declaratory judgment claims claiming to be
19 duplicative of contract claims was denied. That's what LBSF
20 gave Your Honor yesterday. I -- it's hard for me to believe
21 that they didn't think that either Your Honor or myself or
22 both of us would pull out the Enzo-Biochem case and read --

23 THE COURT: Well, I'll tell you right now I
24 haven't had time to pull it out.

25 MR. BIENENSTOCK: Well --

1 THE COURT: So --

2 MR. BIENENSTOCK: -- it's only one or two
3 sentences that are relevant and I'm going to read them.
4 "The Court disagrees" -- this is a quote -- "The Court
5 disagrees that plaintiff's declaratory judgment claims are
6 fully duplicative of the contract claims."

7 The motion to dismiss the declaratory judgment
8 claims was denied because that Court found they were not
9 duplicative, and yet they submit this as contrary authority.

10 I think that speaks volumes and that is consistent
11 with what I wanted to respond to in the opening by LBSF.
12 Your Honor got this PowerPoint and this description that
13 made it sound like the Federal Home Loan Bank made a 70
14 million some-odd gain and only gave them 13 and it was
15 supposed to give them 70 and, gosh, Judge, that poison --
16 that certainly must have poisoned the well in your mind.
17 But Your Honor understood that that goes to the merits and
18 that's not up today.

19 Let me just say that what was told to you earlier
20 was as wrong and sly as citing Enzo-Biochem as if it
21 contradicted our authorities. The -- we have a contract here
22 that -- this master agreement that has the language that
23 we're all fighting over that says how the innocent party is
24 supposed to calculate damages. It says nothing about
25 turning over gains. And they can't show you to the contrary

1 because there's -- it's just -- the word gain or profit or
2 anything like that isn't in there. And there's nothing
3 similar in there.

4 And there's a gross misstatement and a misleading
5 pail that they're trying to put over this case as if we made
6 a gain at their expense. Whatever money the Federal Home
7 Loan Bank made or didn't make was earned because they
8 couldn't cover at 1:45 a.m. on September 8th -- or whatever
9 it was, September 15th, 2008, and when they covered they
10 might have had a big loss or they might have had a big gain,
11 and the loss or gain is attributable to the fact that they
12 were exposed for a period of time before they could line up
13 a transaction.

14 That has absolutely nothing to do with the dispute
15 before Your Honor and yet it's telling again that that's
16 what LBSF starts off with. What this is about is did we
17 compute damages in accordance with the contractual
18 provisions that says how are we supposed to gather up the
19 quotations to --

20 THE COURT: Right.

21 MR. BIENENSTOCK: -- to compute damages. That's
22 it. And my letter to Your Honor cites the relevant language
23 and shows how we're supposed to do it as soon as possible
24 after the early termination date as of a date and time that
25 we select in good faith. And we explain in the letter why

1 we chose the last available market price not impacted by
2 their own default.

3 It's as simple as that. But, anyway, Your Honor,
4 I think from the outset Your Honor certainly made clear
5 where the Court is going and, as I said, we can easily
6 accommodate it by agreeing with Jones Day on appropriate
7 discovery. If we have a dispute, whatever Your Honor's
8 preference is --

9 THE COURT: Well, let's --

10 MR. BIENENSTOCK: -- we'll give you a call or
11 we'll ask for a conference.

12 THE COURT: I -- that's exactly what I want you to
13 do. So I don't want any motions now. I want you to agree
14 on, you know, essentially a pretrial order on discovery. If
15 you have discovery disputes you can come back, but I'm
16 confident you can work them out. If you get to the point
17 where one or the other of you believes you have a
18 dispositive motion, request a conference. We'll take it
19 from there. And if we -- if I don't think that we're going
20 to get there that way, then we're going to set it down for
21 trial.

22 MR. TAMBE: Your Honor --

23 THE COURT: Yeah.

24 MR. TAMBE: -- I see exactly where you're headed
25 and so --

1 THE COURT: Okay.

2 MR. TAMBE: -- I need to make a point because I
3 think what -- one thing counsel said really illustrates
4 while the inefficiencies that's going to arise now. They
5 want to know how, for example, we treated other parties. On
6 the issue of the early termination date, it's a clear
7 contractual issue. There's no reason to look into how
8 Lehman may have --

9 THE COURT: Okay.

10 MR. TAMBE: -- dealt with other parties. There's
11 --

12 THE COURT: Look, I already --

13 MR. TAMBE: -- no reason for discovery of that.

14 THE COURT: -- I already said to you that I have a
15 question about the appropriate scope of discovery by them
16 from you. But we're not there right now. So I'm going to
17 take Mr. Bienenstock at his word. We're going to play by
18 the rules and we'll see. And, you know, more likely than
19 not you're going to come back with this issue because I
20 think that this is going to be a live issue. But, frankly,
21 I'll deal with that as and when you can't agree on it.

22 I see both sides on that particular issue, but I
23 frankly only see one side on my desire to do this once and
24 informed by recent experiences, both in this case and in
25 others, I've become more skeptical about the ability to

1 dispose of these types of issues as being purely legal
2 issues because we have all these unique contexts that I
3 think come into play and may have some bearing.

4 So let's stay efficient.

5 MR. TAMBE: Absolutely.

6 THE COURT: Let's try to stay on track. I
7 appreciate both sides and I'm not going to take Mr.
8 Bienenstock's spirited response to your last letter as an
9 indication that there are going to be hostilities going
10 forward. I'm going to assume that you're going to get
11 along.

12 MR. TAMBE: We'll hug it out, Your Honor.

13 (Laughter)

14 MR. BIENENSTOCK: Thank you, Your Honor.

15 MR. TAMBE: Thank you, Your Honor.

16 THE COURT: All right. Thank you. Thank you for
17 coming in and I'm sorry that you had to wait as long as you
18 did.

19 (Whereupon, these proceedings concluded at 3:45 p.m.)

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C E R T I F I C A T I O N

I, Sheila G. Orms and Sherri Breach certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

Dated: June 23, 2014

Sheila Orms

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AAERT Certified Electronic Reporter & Transcriber

CERT*D-397

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Date: June 23, 2014

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